Judicial Deference to EEOC Interpretations of the Civil Rights Act, the ADA, and the ADEA: Is the EEOC a Second Class Agency?

THEODORE W. WERN*

This Note responds to concerns that the EEOC's interpretations of Title VII, the ADA, and the ADEA have not received their fair share of judicial deference. The author examines Supreme Court opinions in which the Court was faced with a choice of either accepting or rejecting the EEOC's interpretation of one of its empowering statutes. This examination produces an overall "rate of deference" for EEOC interpretations. The author compares the EEOC deference rate to the rate of Supreme Court deference to all agencies (the "baseline") and concludes that the EEOC receives considerably less deference than other federal administrative agencies. Hence, the EEOC can properly be considered a "second class" agency. To test this conclusion, the author examines some of the leading judicial deference cases arising under each of the EEOC's empowering statutes. The result is the same. The author then explores the reasons why EEOC interpretations of these statutes have received so little judicial deference. Finally, he offers some modest recommendations to rescue the EEOC from its second class status.

I. INTRODUCTION

The Equal Employment Opportunity Commission (EEOC) was created to enforce the broad guidelines of the Civil Rights Act of 1964.[1] At present the EEOC has enforcement power over Title VII of the Civil Rights Act,[2] Title I of

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* J.D. candidate, The Ohio State University College of Law. I wish to thank Professors Ruth Colker and Arthur Greenbaum for their invaluable assistance in polishing this Note. I also wish to thank my family for instilling in me the patience and work ethic required to complete this Note; my dearest Sally Burma for her love and inspiration; and Kaylynn Two Trees for her precious wisdom. This Note is dedicated to the memory of William Urban.

[1] *See* Civil Rights Act of 1964, Pub. L. No. 88-352, § 705, 78 Stat. 241, 258–59 (codified as amended at 42 U.S.C. § 2000e-4 (1994)) (providing for composition, duties, and powers of the EEOC). For a comprehensive view of the structure and day-to-day operations of the EEOC, see U.S. COMM'N ON CIVIL RIGHTS, HELPING EMPLOYERS COMPLY WITH THE ADA: AN ASSESSMENT OF HOW THE UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IS ENFORCING TITLE I OF THE AMERICANS WITH DISABILITIES ACT, 38–51 (1998) [hereinafter CCR REPORT ON ADA TITLE I].

[2] *See* 42 U.S.C. § 2000e-5(a) (1994) ("The Commission is empowered . . . to prevent any person from engaging in any unlawful employment practice as set forth in section 2000e-2 or 2000e-3 of this title."); 42 U.S.C. § 2000e-12(a) (1994) ("The Commission shall have authority from time to time to issue, amend, or rescind suitable procedural regulations to carry out the provisions of this subchapter.").

the Americans with Disabilities Act (ADA),[3] and the Age Discrimination in Employment Act (ADEA).[4] Among each of these statutes, a common thread exists: eradication of employment discrimination. However, the EEOC does not have the same authority to enforce and interpret all three statutes. For example, under the Civil Rights Act, Congress did not grant the EEOC the authority to promulgate rules with the force of law,[5] but such a grant is clear under the ADA.[6] With differing grants of authority to the EEOC under different statutes, and varying views regarding the amount of judicial deference that should be given to administrative agencies in general, it is no wonder that the standard of deference for EEOC guidelines is undefined.

With respect to EEOC deference, the most contentious issues arise when judges confront interpretive guidelines as opposed to legislative-type rules or regulations.[7] Even if the EEOC has clear statutory authority to promulgate "regulations" with the force of law (as it does in the ADA context), what happens when it issues "interpretive guidance" as an appendix to the regulations[8] or

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[3] Title I of the ADA covers discrimination in employment decisions. *See* Americans with Disabilities Act of 1990, 42 U.S.C. § 12116 (1990) (authorizing the EEOC to promulgate regulations implementing Title I of the ADA). Title II (public services) and the transportation-related sections of Titles II and III (public accommodations) are enforced, respectively by the Attorney General and Department of Transportation. *See id.* § 12134(a) (authorizing the Attorney General); *see id.* §§ 12149, 12164, 12186 (authorizing the Secretary of the Transportation).

[4] The ADEA was originally enforced by the Wage and Hour Division of the United States Department of Labor. In 1978, President Carter, acting pursuant to the Reorganization Act of 1977, transferred ADEA enforcement power to the EEOC. *See* Reorg. Plan No. 1 of 1978, 3 C.F.R. 321 (1978), *reprinted in* 5 U.S.C. § 2 app. at 1574 (1994) (transferring enforcement and regulatory power over the ADEA from Department of Labor to the EEOC).

[5] The EEOC was only given authority to issue "suitable procedural regulations." *See* 42 U.S.C. § 2000e-12(a) (1994). Furthermore, EEOC guidelines enforcing Title VII of the Civil Rights Act of 1964 were not promulgated pursuant to the Administrative Procedure Act (APA), 5 U.S.C. § 553 (1994). Such procedural requirements will be discussed in more detail below, but they essentially require an agency to post its regulations in the Federal Register for notice and comment before they are published in the Code of Federal Regulations. *See* 5 U.S.C. § 553 (1998).

[6] *See supra* note 3 (discussing who has the authority to enforce various statutes).

[7] Legislative-type regulations, unlike interpretive guidelines, carry the force of law, and thus can only be disregarded in rare circumstances. *See* KENNETH CULP DAVIS & RICHARD PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 6.3, at 250–55 (3d ed. 1994) (discussing the binding effect of legislative rules). This distinction is discussed in detail below. *See infra* Part II.C.

[8] The EEOC promulgated regulations at 29 C.F.R. § 1630 (1998), but also attached an appendix titled "Interpretive Guidance," which mirrors the regulations in citation form (except for the addition of "app." at the end of each cite). In substance, the Interpretive Guidance is

"enforcement guidance?"[9] These types of guidance carry less inherent weight than regulations, but often reflect agency expertise that no other person or entity can match.[10]

Currently, no settled judicial view exists as to when the courts should defer to EEOC interpretations, and some commentators argue that the EEOC receives less than its fair share of deference.[11] The purpose of this Note is to determine whether the EEOC actually receives less deference than other agencies, and if so, to explore the means of redeeming the agency from its second class status.

The order of analysis is as follows. Part II explores, as background material, the two major theoretical models for agency deference: "earned" and "compelled" deference. Part III presents a statistical comparison between overall Supreme Court deference to agencies and the EEOC. Part IV discusses the major deference problems arising from EEOC interpretations of Title VII, the ADEA, and the ADA, with a special focus on the ADA. Part V presents some views on why the EEOC has received its second class status. Finally, Part VI provides recommendations which, if implemented, could render the EEOC a more effective and respectable administrative agency.

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quite different in that it seeks to define any ambiguous words or phrases codified in the ADA. The real question, which will be explored at length in Part IV.C.1 below, is whether the Guidance should be entitled to the weight of its neighboring "regulations."

[9] This type of guidance is entitled to the least deference. It is not published for notice and comment pursuant to the APA. Furthermore, it is often published many years after enactment of the statute. *See* Colin S. Diver, *Statutory Interpretation in the Administrative State*, 133 U. PA. L. REV. 549, 562 n.95 (1985) (citing contemporaneity with enactment as one factor that increases the weight of an agency interpretation). Enforcement guidance will be discussed in detail below in the context of the ADA. *See infra* Part IV.C.2.c.

[10] Congress has recognized the unique expertise of the EEOC in the area of employment discrimination. *See* H.R. REP. NO. 92-238 (1971), *reprinted in* 1972 U.S.C.A.A.N 2137, 2146 ("Administrative tribunals are better equipped to handle the complicated issues involved in employment discrimination cases.").

[11] *See* Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99, 144–46 (1999) (arguing that EEOC interpretations of civil rights statutes have not fared well in the courts). *But cf.*, CCR REPORT ON ADA TITLE I, *supra* note 1, at 241–69 (criticizing the EEOC's interpretive and enforcement practices in the context of Title I of the ADA); Jamie A. Yavelberg, *Revival of* Skidmore v. Swift*: Judicial Deference to Agency Interpretations After* EEOC v. ARAMCO, 42 DUKE L.J. 166, 200 (1992) (arguing that in the context of EEOC guidance "it is simply not good practice for courts to defer to interpretive rules" because they are exempt from APA requirements).

II. THEORETICAL MODELS OF AGENCY DEFERENCE

The following subsections present two well-settled models of deference to agency guidance: earned and compelled deference.[12] Earned deference applies to agency guidance that has not undergone the basic procedures necessary to formulate a legally binding rule.[13] Courts are not compelled to follow this type of guidance, rather, they conduct their own evaluation to determine the proper weight of the agency's opinion.[14] On the other hand, compelled deference applies to rules that have passed all necessary procedures, and can properly be considered binding.[15] A court is compelled to follow this type of guidance unless it directly conflicts with the statute that originally empowered the agency.[16] Both models will be explained in greater detail below.

The basic similarity between the compelled and earned deference models is that unambiguous statutory language supersedes both models.[17] A court must first consider whether Congress has spoken clearly to the disputed issue.[18] If so, then neither deference model applies, and the inquiry ends.[19]

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[12] Scholars have also proposed some creative deference models that the courts have not adopted. *See* Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 1010–13 (1992) (proposing the "executive precedent model"); John S. Moot, *An Analysis of Judicial Deference to EEOC Interpretive Guidelines*, 1 ADMIN. L.J. 213, 215–16 (1987) (proposing the "modified deferential model").

[13] The procedure required for a binding informal rule is commonly known as the "notice and comment" process, and is governed by § 553 of the APA. *See* 5 U.S.C. § 553 (1994). For a more detailed analysis of this procedure, see *infra* note 56.

[14] *See infra* Part II.A (discussing earned deference).

[15] *See infra* Part II.B (discussing compelled deference).

[16] *See id.*

[17] The notion that plain statutory meaning precludes consideration of agency guidance is emphatically announced by Justice Stevens in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*: "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." 467 U.S. 837, 842–43 (1984). This is the first step of *Chevron*'s notorious two-step deference test. The second step refers to situations in which the statute is ambiguous and must be clarified by agency guidance. *See infra* note 51 and accompanying text (describing the second step of *Chevron* test).

[18] *See Chevron*, 467 U.S. at 842. One purpose of agency interpretations is to articulate standards that are too technical or controversial for Congress to handle, not to replace a clearly stated Congressional purpose. *See id.* at 843–44 (noting that the effectiveness of an administrative agency "necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.").

[19] *See id.* at 842. This approach can be dangerous, for it may allow a judge to circumvent reasonable agency guidance by announcing a plain statutory meaning, even when such meaning is much less than plain. *See* Thomas W. Merrill, *Textualism and the Future of the*

Both of the above models relate to the varying amounts of deference that courts will afford to administrative agencies. Therefore, earned and compelled deference represent judicial reasoning in "deferential mode."[20] A court in this mode will recognize some inherent value of agency guidance, and seek a balance of interpretive responsibility between itself and the administrative agency.[21] This is distinguished from the so-called "independent mode," in which the court gives no special deference to agency guidance.[22] In the independent mode, a court treats agency guidance no differently than other interpretive guidance such as legislative history, or the litigants' arguments.[23] It is important to note that the mode (whether deferential or independent) does not necessarily determine the outcome in a given deference case. A court operating in independent mode is free to follow an agency's view,[24] and a court in deferential mode may reject it.[25]

Regardless of which mode (deferential or independent), or standard (compelled or earned) might apply, judges who examine agency constructions often face the seemingly endless question that riddled Chief Justice Marshall in *Marbury v. Madison*:[26] who has the ultimate duty to decide what the law is? Marshall passed on to the judiciary the ultimate duty of *constitutional* interpretation,[27] but the question remains: should the same interpretive duty

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Chevron Doctrine, 72 WASH. U. L.Q. 351, 353–54 (1994) (pointing out the underlying tension between the plain meaning approach and deference to agency interpretations, in that the former may send judges into an "autonomous interpreter" mode that prompts excessive disregard for agency guidance).

[20] *See* Diver, *supra* note 9, at 559 (describing the "deferential mode").

[21] *See id.* at 559 (describing the deferential mode as a situation in which the court "accord[s] a distinctive status to [the agency's] interpretation").

[22] *See id.* at 552–59 (describing the "independent mode").

[23] *See id.* at 559 (describing the independent mode as a situation in which "the Court specifies what the statute at issue means without regard for the way in which any other non-legislative entity would interpret the statute"); Moot, *supra* note 12, at 215–16 (stating that, under the independent mode, "the legislative will is changed only through amendment or repeal of a statute and not through interpretation by judges or appointed administrators of executive agencies").

[24] Courts may cite an agency view in passing, and ultimately agree with it, without according any special weight to that view. *See* cases cited *infra* note 87 and app. A (discussing this phenomenon in the context of Supreme Court deference to EEOC interpretations).

[25] A good illustration of a court rejecting agency guidance despite an overall deferential posture is provided in *Espinoza v. Farah Manufacturing Co.*, 414 U.S. 86 (1975). There, the Supreme Court stated that EEOC guidance was entitled to "great deference," but ultimately rejected the guidance, recognizing that "deference must have limits." *Id.* at 94.

[26] 5 U.S. 137 (1803).

[27] *See id.* at 177 ("It is emphatically, the province and duty of the judicial department, to

apply to statutory interpretation when an agency has exercised its delegated power to interpret the statute at issue? Therefore, the basic problem of separation of powers lingers at the foundation of any deference debate.[28]

A more fundamental problem arising from agency guidance is whether the United States Constitution allows any delegation of legislative power to an agency. The Constitution states that "All legislative Powers herein granted shall be vested in a Congress . . . ."[29] On its face, this provision seems to preclude any delegation, and thus, any discussion about different models and modes of deference would be moot. However, the constitutional provision known as the Necessary and Proper Clause provides some justification for delegation of legislative power to administrative agencies. The Clause states: "The Congress shall have Power . . . to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."[30] The argument which follows is that delegation to agencies that possess superior expertise over a matter at issue is "necessary and proper" for the most efficient functioning of the legislature.[31] Yet, to satisfy this constitutional requirement, Congress must delegate authority in a specific fashion to ensure that the delegatee's legislative power is not overbroad.[32] As

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say what the law is.").

[28] *See* PETER L. STRAUSS et al., ADMINISTRATIVE LAW 51–52 (outlining the basic constitutional problems arising from delegation and exercise of agency power). Professor Martin Shapiro also provides an interesting theoretical perspective on the role of agencies in a democratic system. *See* Martin Shapiro, *On Predicating the Future of Administrative Law*, REGULATION, May-June 1982, at 18, 19–25 (discussing the development of administrative law beginning during the New Deal and explaining how the problems of allowing non elected officials to make binding policy since have been addressed). Shapiro presents two different views on agency deference. Under the "technocratic" perspective, the agency deserves great deference because of its expertise. However, from a purely democratic perspective, agencies insulated from the political process (and thus, the popular will) are threatening to democratic ideals. *See id.* at 21–22 (explaining that insulated agencies are more likely to cater to those organizations that are best able to "obtain [ ] and exploit [ ] access to government and to the public at large. ").

[29] U.S. CONST. art. I, § 1.

[30] *Id.* at § 8.

[31] An example in which delegation is necessary is in the environmental context. Congress can make a decision to favor social over industry interests, but could not possibly determine precise amounts of chemicals that should be allowed into the atmosphere, water, etc. *See generally* Chevron, U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984).

[32] Under the guise of the "delegation doctrine," the Supreme Court has traditionally struck down, as unconstitutional, statutes that make sweeping delegations of legislative authority to the President or an administrative body. *See, e.g.*, A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 541–42 (1935); (striking down section 3 of the National

long as Congress upholds its end of the constitutional bargain, courts will most likely recognize delegation of legislative power to agencies. Beyond such recognition lies the question of deference. How do courts respond to agency action after proper delegation? In particular, do courts respond to EEOC action pursuant to proper delegation as favorably as other administrative agencies?

A. *Earned Deference: The* Skidmore v. Swift *Standard*

The earned deference standard applies when delegation of rulemaking authority to an agency is not clear from the empowering statute[33] or when delegation exists but the agency does not exercise its delegated authority to promulgate binding rules.[34] If an agency's action falls into either of these categories, the agency must *earn* judicial deference by satisfying certain judicially-crafted standards.[35] In an earned deference case, a court may look to

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Industrial Recovery Act of 1933 as an unlawful delegation of legislative power to the President). Justice Rhenquist, concurring in *Industrial Union Department, AFL-CIO v. American Petroleum Institute*, noted that the delegation doctrine serves three basic functions. *Id.* at 685. It ensures that (1) the most important policy choices are made by Congress; (2) Congress will provide the recipient of authority with an "intelligible principle" to guide the exercise of its delegated power; and (3) the courts will be able to exercise judicial review over Congress's delegation of authority to determine whether it comports with basic constitutional principles. *See id.* at 685–86. Much ink has been spilled by scholars in debate over the propriety of the delegation doctrine. *Compare* JOHN HART ELY, DEMOCRACY AND DISTRUST, A THEORY OF JUDICIAL REVIEW 131–34 (1980) (arguing that delegation of "hard decisions" to agencies through vaguely worded statutes is "undemocratic" because of the lack of accountability for agency action); *with* Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81, 95–99 (1985) (arguing that political accountability exists in the administrative context through presidential elections, and that administrators operate within proper procedural and legal constraints).

[33] For example, the EEOC did not receive complete rulemaking authority under Title VII, thus, interpretations of that statutory provision fall under the earned deference standard. *See supra* note 5 (discussing incomplete grant of regulatory authority to the EEOC under Title VII).

[34] Under the ADA, the EEOC did receive complete authority to promulgate binding rules. *See* Bragdon v. Abbot, 118 S.Ct. 2196, 2209 (1998) (recognizing 42 U.S.C. § 12116 as the source of ADA rulemaking authority). However, the EEOC may choose not to exercise its authority when promulgating "interpretive" or "enforcement" guidance. Despite the name, EEOC interpretive guidance may arguably transcend the earned deference category because it was subject to APA notice and comment procedures. Therefore, enforcement guidance is a better example of a situation in which the EEOC chooses not to exercise its rulemaking authority, and thereby triggers the earned deference standard.

[35] The reference to an agency "earning" judicial deference reflects the reality that some agency guidance is not inherently entitled to judicial deference. Such guidance may be subjected to a reliability test. Depending on the result of that test, a judge in his or her

factors set forth in *Skidmore v. Swift*[36] to determine the weight given to agency guidance.[37]

The interpretive question in *Skidmore* was whether time spent by employees waiting on an employer's premises to respond to fire calls, in addition to regular daytime work, constitutes "working time" under the Fair Labor Standards Act (FLSA).[38] Congress did not delegate rulemaking authority over the FLSA to any agency,[39] but it did empower an Administrator to explore working conditions in industries subject to the Act, and to enjoin any unlawful employment practices.[40] The Court determined that the Administrator's views are not controlling upon the courts, but "do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance."[41]

The Court then announced its famous test for determining the weight of non controlling agency guidance. The weight of such an agency interpretation will depend upon "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."[42] After applying the above factors, the Court deferred to the Administrator's interpretation, and reversed the district court's decision that waiting time is not "working time" under the FLSA.[43]

Although numerous other factors not mentioned in *Skidmore* may affect the weight of an interpretation,[44] the bottom line in an earned deference case is that a

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discretion, may accept or reject the agency's view. Thus, some agency guidance must "earn" deference. For an example of another commentator's usage of the phrase "earned" deference, see Nicholas S. Zeppos, *Judicial Review of Agency Action: The Problems of Commitment, Non-Contractability, and the Proper Incentives*, 44 DUKE L.J. 1133, 1153 (1995).

[36] 323 U.S. 134 (1944).

[37] *See id.* at 140.

[38] *See id.* at 135–37.

[39] The Court pointed out that the absence of an explicit grant of rulemaking authority preserved interpretive power for the courts. "Congress did not utilize the services of an administrative agency to . . . determine in the first instance whether particular cases fall within or without the Act. Instead, it put this responsibility on the courts." *Id.* at 137.

[40] *See id.* at 137–38 (discussing the Court's understanding of the role of the Office of Administrator).

[41] *Id.* at 140.

[42] *Id.*

[43] *See id.*

[44] Professor Colin S. Diver has documented other factors cited by the Supreme Court that affect the weight of an agency interpretation. They include: (1) whether the agency construction was contemporaneous with the passage of the statute; (2) whether the construction is of longstanding application; (3) whether the public has relied upon the construction; (4) whether the construction involves a matter of public controversy; (5) whether the agency has

court has great discretion in determining whether an agency has earned its deference. If a court finds that a non binding agency rule suffers from some procedural infirmity, or is not consistent with what the court believes is Congress's intent, then the court may disregard the agency interpretation and substitute its own views as to what the statute means.[45]

B. *Compelled Deference in the* Chevron *Era*

In *Chevron U.S.A. Inc. v. Natural Resources Defense Council*,[46] a unanimous Supreme Court articulated what has become known as the compelled deference standard.[47] The issue in *Chevron* was whether the court of appeals was correct to set aside, as "contrary to law," regulations promulgated by the Environmental Protection Agency (EPA) that defined the term "stationary source" from the Clean Air Act.[48] After articulating and applying its notorious deference test, the Court deferred to the EPA's "reasonable policy choice," and reversed the court of appeals' decision.[49]

Justice Stevens articulated a two-step test for determining when and how to defer to agency regulations. The first step is simple: if the plain language of the statute is clear, then a court is obliged to follow that language without deference to agency regulations.[50] Under the second step, if the statute is ambiguous, then

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rulemaking authority; (6) whether the interpretation is based on expertise or involves a technical or complex subject; (7) whether agency action is necessary to set the statute in motion; (8) whether Congress was aware of the agency interpretation and failed to repudiate it; and (9) whether the agency has expressly addressed the application of the statute to its proposed action. For a complete list of factors, including case citations, see Diver, *supra* note 9, at 562 n.95.

[45] *See, e.g.*, Public Employees Retirement Sys. of Ohio v. Betts, 492 U.S. 158, 175 (1989) (rejecting the EEOC interpretation of the word "subterfuge" in the Age Discrimination in Employment Act, and substituting the previous Supreme Court interpretation).

[46] 467 U.S. 837 (1984).

[47] "Compelled deference" is used to describe the type of deference given to agency rules that carry the force of law and satisfy the reasonableness requirement of the *Chevron* test. *See infra* notes 50–52 and accompanying text. *Chevron* itself does not use the phrase "compelled deference," rather, it has been used by several commentators discussing *Chevron* deference. *See e.g.*, Jerome Nelson, *The Chevron Deference Rule and Judicial Review of FERC Orders*, 9 ENERGY L.J. 59, 71 (1988); Yavelburg, *supra* note 11, at 186.

[48] *See Chevron*, 467 U.S. at 842 (stating that the Court "must determine whether the Court of Appeals' legal error resulted in an erroneous judgement on the validity of the regulations").

[49] *See id.* at 866 (holding agency's interpretation is a "permissible construction of the statute," which should be accepted by courts, "who unlike the political branches, have no constituency").

[50] *See id.* at 842–43.

the "question for the court is whether the agency's answer is based on a permissible construction of the statute."[51]

With regard to the second step, Justice Stevens further provides:

> If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.[52]

Under the above test, a court is *compelled* to follow "legislative regulations" for which an explicit grant of authority exists, except in the rare cases in which the regulation is deemed arbitrary, capricious, or manifestly contrary to the statute.[53] Little discretion remains for the reviewing court under this standard.

One notable problem arising from *Chevron* is the fact that its deference standard does not appear to cover non binding or "interpretive" rules; it only applies to "legislative regulations."[54] This is problematic because "legislative regulations" comprise only a portion of an agency's rulemaking efforts.[55] If *Chevron* is read to apply only to binding regulations, then its impact on judicial deference is actually quite narrow, because some of the most contentious deference issues arise from non binding agency guidance. The majority of the Supreme Court has nonetheless been content to exclude interpretive rules from *Chevron*'s scope, but support for this view is not unanimous.[56]

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[51] *Id.* at 842–43.

[52] *Id.* at 843–44. *Chevron* was not the first Supreme Court case to announce the deference standard for legislative regulations. *See, e.g.*, United States v. Morton, 476 U.S. 822, 834 (1984); Schweiker v. Gray Panthers, 453 U.S. 34, 44 (1981); Batterton v. Francis, 432 U.S. 416, 424–26 (1977); American Tel. & Tel. Co. v. United States, 299 U.S. 232, 235–37 (1936).

[53] Professor Merrill, in an empirical study, found very few cases in which the Supreme Court struck down regulations on the ground that they were adopted in an arbitrary and capricious manner as opposed to being in conflict with the statute. *See* Merrill, *supra* note 12, at 981 n.51 (1992).

[54] Interpretive rules are rules for which no congressional authority exists or rules promulgated without a proper exercise of delegated authority. *See* Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them to Bind the Public*, 41 DUKE L.J. 1311, 1313–14 (1992) (framing the distinction between legislative and interpretive rules). The two step deference test announced in *Chevron* only applies to "legislative regulations." *Chevron*, 467 U.S. at 844.

[55] In addition to legislative regulations, an agency may issue interpretive guidance or policy statements. *See* DAVIS & PIERCE, *supra* note 7, at 228–250 (distinguishing various rule-making efforts).

[56] *See* EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 260 (1991) (Scalia, J., concurring) (arguing that even non controlling agency guidance should be entitled to deference if reasonable). Some lower federal courts have interpreted *Chevron*'s second step to apply to

C. *Legislative Versus Interpretive Rules*

Legislative regulations are grounded in a congressional grant of authority,[57] and enacted pursuant to the Administrative Procedure Act (APA)[58] while interpretive rules are exempt from these requirements.[59] The purpose of this exemption is to "allow agencies to explain ambiguous terms in legislative enactments without having to undertake cumbersome proceedings."[60] When courts face difficulty distinguishing between the two, they generally focus upon

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interpretive rules. *See* American Fed'n of Gov't Employees v. Fed. Labor Relations Auth., 778 F.2d 850, 861 (D.C. Cir. 1985) (accepting Federal Labor Relations Act (FLRA) "Interpretation and Guidance" and holding that the agency may disapprove of contracts containing provisions ordered by Federal Service Impasses Panel—which is contrary to law); Conley v. Brewer, 652 F. Supp. 106, 109–10 (W.D. Wis. 1986) (accepting Parole Commission's interpretive regulation and explanatory statement that "good time" credits expire when prisoners are released on parole); *cf.* Robert A. Anthony, *Which Agency Interpretations Should Bind Citizens and the Courts?*, 7 YALE J. ON REG. 1, 56–57 (1990) (suggesting that interpretive rules should be entitled to stronger deference if they are subjected to notice and comment).

[57] The ADA, Title I, provides an example of a clear grant of rulemaking authority to the EEOC. "Not later than 1 year after July 26, 1990, the Commission shall issue regulations in an accessible format to carry out this subchapter . . . ." 42 U.S.C. § 12116 (1994).

[58] The APA sets forth the procedural requirements necessary for promulgation of a binding agency rule. *See* 5 U.S.C. § 553 (1994) (setting forth publicity requirements for agencies promulgating binding regulation). The APA distinguishes between formal and informal rulemaking, either of which could satisfy the compelled deference standard if a congressional grant of rulemaking authority is explicit. *Compare* 5 U.S.C. § 553, *with* 5 U.S.C. § 556 (1994). Informal rulemaking (also called "notice and comment rulemaking") is subject to section 553 of the APA which requires an agency to afford "interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation." 5 U.S.C. § 553. This notice and comment procedure takes place through publication of an initial draft of the regulations in the Federal Register. *See* 5 U.S.C. § 553(b). On the other hand, formal rulemaking (which is less common than the informal variety) is governed by sections 556 and 557, which require certain rules to be made "on the record" after opportunity for an agency hearing. 5 U.S.C. §§ 556, 557 (1994).

[59] The APA states that notice and comment requirements do not apply to "interpretative [sic] rules, general statements of policy, or rules of agency organization, procedure, or practice." 5 U.S.C. § 553(b)(A). One scholar suggests that interpretive rules should be subject to the notice and comment process. *See* Anthony, *supra* note 54, at 1376 ("It would champion the worthy precepts of the APA, however, if in certain circumstances agencies would voluntarily make use of notice-and-comment rulemaking procedures to develop interpretive rules."). The EEOC, when promulgating the "Interpretive Guidance" for its ADA regulations, did exactly what Professor Anthony suggests: it subjected that guidance to notice and comment. However, as discussed later in this Note, this tactic was not entirely successful in securing deference. *See infra* Part IV.C.1.

[60] American Hosp. Ass'n v. Bowen, 834 F.2d 1037, 1045 (D.C. Cir. 1987).

the rule's impact on interested parties, rather than its form or origin.[61]

A rule's origin could be determined by its procedural history,[62] or by a more obvious indicator—its name.[63] To determine impact, a court may consider whether the rule creates new rights, produces significant effects on private interests, or imposes obligations on the public.[64] Only a legislative rule supported by a congressional grant of authority (either explicit or implicit) is presumed to have such powerful effects. An interpretive rule, on the other hand, "simply states what the administrative agency thinks the statute means, and only 'reminds affected parties of existing duties.'"[65] Therefore, if an agency rule produces powerful and binding effects, it may be properly considered "legislative," even if the origin of the rule suggests otherwise.[66]

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[61] This is known as the "legal effect" test. *See* JEFFREY S. LUBBERS, A GUIDE TO FEDERAL AGENCY RULEMAKING 61–64 (3d ed. 1998). Lubbers also outlines another test, the "binding norm" test, which, as he notes, is better suited to distinguishing legislative-type rules from policy guidance. *See id.* at 64.

[62] The APA provides that legislative rules must be subjected to the notice and comment process. *See* 5 U.S.C. § 553 ("General notice of proposed rulemaking shall be published in the Federal Register . . . .").

[63] The most obvious way for an agency to show that it is *not* exercising its delegated rulemaking authority is to label a rule as "interpretive." The EEOC made the choice (or arguably, the mistake) of calling its ADA regulatory appendix "Interpretive Guidance." However, this choice may not be fatal, for as one court noted: "[T]he agency's own label, while relevant, is not dispositive." General Motors Corp. v. Ruckelshaus, 742 F.2d 1561, 1565 (D.C. Cir. 1984).

[64] *See* Chrysler Corp. v. Brown, 441 U.S. 281, 302–03 (1979) ("We described a substantive rule—or a 'legislative-type rule,'—as one 'affecting individual rights and obligations.' ") (citations omitted) (quoting Morton v. Ruiz, 415 U.S. 199, 232, 236 (1974); General Motors Corp. v. Ruckelshaus, 742 F.2d at 1565 ("[I]f by its action the agency intends to create new law, rights or duties, the rule is properly considered to be a legislative rule."). For similar pronouncements, see Flagstaff Med. Ctr. v. Sullivan, 773 F. Supp. 1325, 1351–52 (D. Ariz. 1991), *aff'd in part, rev'd in part*, 962 F.2d 879 (9th Cir. 1992); Klingler v. Yamaha Motor Corp., 738 F. Supp. 898, 903 (E.D. Pa. 1990).

[65] *Ruckelshaus*, 742 F.2d at 1565–66 (citing Citizens to Save Spencer County v. United States Envtl. Protection Agency, 600 F.2d 844, 876 & n.153 (D.C. Cir. 1979)).

[66] Judge Kenneth Starr focused on impact in drawing the distinction between legislative and interpretive rules, but recognizes the complexities of this standard. He declared that a "legislative rule is recognizable by virtue of its binding effect." Alaska v. Dept. of Trans., 868 F.2d 441, 445 (D.C. Cir. 1989). He further noted that this "definitional principle . . . is hardly self-executing," and cited numerous "factors" which may be necessary to properly categorize a rule. *Id.* at 466. The factors that he used to determine whether the agency rule had binding effect included: mandatory language, publication in the Code of Federal Regulations, limitations upon agency discretion, and the ability of the agency to prosecute persons for noncompliance with agency guidelines. *See id.* at 446–47.

However academic the distinction between legislative and interpretive rules may seem, it may be critical in a deference case because legislative rules that have been subjected to notice and comment procedures, qualify for *Chevron* deference while interpretive rules usually do not.[67] This distinction also raised the question of whether rules that are clearly interpretive in nature should nonetheless qualify for *Chevron* deference if they are subjected to the notice and comment process. This question will arise again later in a discussion of EEOC "Interpretive Guidance."[68] For now, the focus remains on theoretical models of deference, and more specifically, the effects of *Chevron.*

D. *The Practical Effects of* Chevron *on Agency Deference*

Chevron was cited in approximately 3,500 federal cases from 1984 to 1996.[69]Although the *Chevron* standard has been proclaimed as a "revolution on paper,"[70] its practical effect on deference decisionmaking is unclear.[71] According to an empirical study by Professor Thomas Merrill, the rate of Supreme Court deference to agency interpretations did not change significantly

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[67] No language in *Chevron* explicitly precludes its application to interpretive rules, but the majority of the Court has "read in" that preclusive effect. *See supra* notes 54–56 and accompanying text (discussing preclusive effect of *Chevron*).

[68] This Guidance, which was published as an appendix to the ADA regulations, was subjected to notice and comment requirements. *See infra* Part IV.C.1.

[69] A LEXIS search conducted on December 5, 1996 in the GENFEDS:COURTS database, which includes all published federal decisions, generated 3,567 cases citing *Chevron. See* David M. Gossett, *Chevron, Take Two: Deference to Revised Agency Interpretations of Statutes*, 64 U. CHI. L. REV. 681, 695 & n.67 (discussing the quantity of *Chevron* citations).

[70] The *Chevron* test is characterized by Professor Merrill in this manner because, prior to 1984, the Supreme Court had no consistent standard for determining when to defer to agency interpretations. *See* Merrill, *supra* note 12, at 971–72. During this period, the approach was "pragmatic and contextual," and the results, "could range from 'great' to 'some' to 'little'" deference. *Id.* at 972. *Chevron* presents a clear, categorical test for deference, hence, it is aptly described as a "revolution on paper." For another perspective on how *Chevron* strengthened the deference principle, see generally Kenneth W. Starr, *Judicial Review in the Post-Chevron Era*, 3 YALE J. ON REG. 283 (1986). Judge Starr discusses three ways in which *Chevron* buttressed the deference principle: first, it removed the ambiguity arising from a long line of cases, some of which called for deference and others which disregarded it altogether; second, it curbed judicial discretion to invalidate agency guidance based on perceived inconsistencies with congressional policies; and third, it specified certain conditions under which courts are compelled to give controlling weight to agency interpretations. *See id.* at 292–99.

[71] Upon examination of post-*Chevron* trends, Professor Merrill concluded that "[T]he overall picture suggests that the judicial understanding that informs the deference question is probably more confused today than it has ever been." Merrill, *supra* note 12, at 980.

after *Chevron*.[72]

Merrill's suggestion that *Chevron*'s practical effects are negligible contrasts sharply with another empirical study by Professors Peter Schuck and Donald Elliot. The latter study surveyed the effects of *Chevron* on lower courts and found that deference rates increased sharply after *Chevron*.[73] However, as Merrill points out, this study does not necessarily conflict with his data because "[l]ower courts probably take Supreme Court opinions more seriously than does the Court itself."[74] Merrill further asserts that the effect of *Chevron* in lower courts may have been only temporary.[75]

Despite its interpretive problems, *Chevron* does provide valuable background for the following distinction between legislative and interpretive rules.

III. AN EMPIRICAL PERSPECTIVE ON JUDICIAL DEFERENCE TO THE EEOC

Having provided some background on the different models of judicial deference, I now consider how those models have been applied to EEOC guidance. I first present empirical data collected by Professor Thomas Merrill regarding Supreme Court deference to *all* agencies. This will serve as a baseline against which I compare the rate of Supreme Court deference to the EEOC. If EEOC deference rates are significantly lower than the baseline figure, then one could claim (albeit not with absolute certainty) that the EEOC receives less than its fair share of deference. I caution the reader, as many scholars have cautioned me, that empirical research in the area of agency deference is inherently

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[72] Professor Merrill compared Supreme Court deference cases in two time periods: 1981 to 1983 (pre-*Chevron*), and 1984 to 1990 (post-*Chevron*). In the first block, he found that the agency view was "accepted" in 75% of 45 cases. In the second block, the rate was 70% of 90 cases. Although these statistics may be misleading for multiple reasons (the most obvious of which is small sample size), one could safely say that this study, if accurate, softens the flame of the "*Chevron* Revolution." *See id.* at 980–83.

[73] The study reported strong evidence that lower court decisions granting deference were affirmed at a rate of 71% in the six months prior to *Chevron*, compared to an 81% affirmance rate during a six-month period in 1985, after *Chevron*. *See* Peter H. Schuck & Donald Elliott, *To the Chevron Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984, 1029–32 (1990). However, the article also reports only a 76% deference rate in 1988 (with remands twice as frequent as reversals, whereas in 1984–85 they had been roughly equal). By that year, according to Shuck and Elliot, "the Supreme Court had appeared to recede from the position of extreme deference," and the lower courts apparently followed suit. *Id.* at 1037.

[74] Merrill, *supra* note 12, at 984.

[75] *See id.* at n.62 (citing instances in which Shuck and Elliot recognize the weaknesses of their own conclusions and offer reasons why the post-*Chevron* change might not endure).

unreliable. In response to this problem, I have attempted to reinforce my empirical research with a more narrow deference inquiry. I examine some of the leading deference cases in the context of the Civil Rights Act, the ADEA, and the ADA—with a special focus on the ADA.

A. *Overall Agency Deference After* Chevron*: The Baseline*

Professor Thomas Merrill examined Supreme Court deference to administrative agency interpretations in a "pre" and "post" *Chevron* framework.[76] Between 1981–1983 (3 years before *Chevron* was decided), the "total cases involving [a] deference question" was 45,[77] and the "agency view [was] accepted" in 34 of those cases,[78] yielding a 75% deference rate.[79] Between 1984–1990 (post-*Chevron*), 63 out of 90 cases involving deference, or 70%, resulted in acceptance of the agency view.[80] Thus, the average deference rate from these two time periods is approximately 72%.

Before drawing any conclusions from these numbers, I must point out what I believe are the major weaknesses of the above survey. First, the data does not distinguish between different agencies, which is critical because different agencies might receive different treatment in the courts. For example, one cannot necessarily assume that a 72% acceptance rate would apply equally to the SEC and the EEOC.[81]

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[76] *See generally* Merrill, *supra* note 12 (comparing Supreme Court deference to agency interpretation in the three terms prior to *Chevron* with Court deference in the seven terms after *Chevron*).

[77] *See id.* at 982 tbl.2. This title category, although simple on its face, presents certain methodological problems recognized by Merrill in an elaborate footnote. *See id.* at 981 n.51. The first of those problems is that many cases exist where the Court substitutes its own judgment for that of the agency and fails to even mention deference. However, it would be difficult to determine all the cases in which the Court *could* have deferred. Thus, Merrill excluded these so-called "potential deference" cases from his sample. The second problem was caused by cases which "present slight variations on the question of deference," such as agency interpretations of its own regulations or treaties; or challenges to agency policies on the ground that they were adopted in an arbitrary and capricious manner (as opposed to being in conflict with the statute). Merrill excluded these cases, which are relatively few in number, to "minimize complexity." *See id.*

[78] *See id.* at 982 tbl.2. Again, this title category requires some explanation. Merrill points out that "accepting the agency interpretation is not the same as ruling in favor of the government." *Id.* at 981 n.52. He goes on to cite *Bob Jones University v. United States*, 461 U.S. 574 (1983), a case in which the Solicitor General disclaimed the agency view, but the Court deferred to it.

[79] *See* Merrill, *supra* note 12, at 982 tbl.2.

[80] *See id.* at 981 tbl.1.

[81] From one broad empirical study, one *could* infer that the SEC and EEOC receive

Second, the surveys do not distinguish between different *types* of agency guidance. Agencies could issue regulations, interpretive guidance, interim enforcement guidance, or technical assistance.[82] A regulation promulgated under express authority from Congress will almost always receive deference unless arbitrary or capricious, while interim enforcement guidance is easily disregarded.[83] Thus, deference rates will vary widely depending on the *type* of agency guidance at issue.

Another fundamental problem arises in determining the *category*—"deference" or "no deference"—into which the agency guidance is placed. Often the Court will not explicitly pay deference, but merely cite some agency guidance in passing or with mild approval. Placing these cases in the "deference" category may ultimately shift the balance of cases in a misleading way. However, creating a standard to distinguish them would be a technical nightmare.

Despite these problems, empirical research brings us closest to the truth about agency deference. The "leading case" approach, which involves analysis of a discrete sample of representative cases, is another method often used to identify trends in Supreme Court jurisprudence.[84] This approach, although certainly more convenient for the researcher, is much less reliable than empirical research for

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similar rates of judicial deference. *See generally* Reginald S. Sheehan, *Administrative Agencies and the Court: A Reexamination of the Impact of Agency Type on Decisional Outcome*, 43 W. POL. Q. 875, (1990) (finding similar deference rates between "economic" and "social" agencies). Professor Sheehan examined over 800 Supreme Court cases from 1953–1988 and placed each case into one of two categories: economic agencies such as the FCC, NRC, and SEC; and social agencies such as the EPA, EEOC, FDA, NLRB, and OSHA. *See id.* at 877–78. He further broke them down according to the Court period: Burger and Warren Court. After further categorization into "liberal" or "conservative" agency action, he found that, despite significant vacillation in deference rates between different Courts, the average deference rate for economic and social regulations was roughly the same. *See id.* at 879–81. The rate for social regulations was approximately 75% compared to a 73% rate for economic regulations. For a detailed chart of these findings, which properly separates the data according to the time period and the type of guidance, see STRAUSS, *supra* note 28, at 514.

[82] These types are listed in order of strength, with regulations being most persuasive and technical assistance being the least persuasive. *See* CCR REPORT ON ADA TITLE I, *supra* note 1, at 66–77 (discussing different types of agency guidance and their persuasive values). Although the empirical studies at issue do discard regulations reviewed under the arbitrary and capricious standard, *see* Merrill *supra* note 12, at 981 n.51, they still do not distinguish between other types of agency guidance.

[83] Interim enforcement guidance is entitled to very little deference. This type of guidance is discussed below in the context of the ADA. *See infra* Part IV.C.2.c.

[84] *See* Shuck & Elliot, *supra* note 73, at 1060 (contrasting the "empirical" and "leading case" approaches).

determining legal trends.[85] This Note takes a "belt-and-suspenders" approach by first, presenting empirical data regarding deference to the EEOC; and second, conducting an analysis of a discrete sample of "leading" EEOC deference cases.

B. *Supreme Court Deference to the EEOC: Beyond the Baseline*

One purpose of this Note is to determine whether the EEOC receives less deference than other administrative agencies. After examining the total number of Supreme Court cases involving deference to EEOC guidance and comparing that data to the baseline figure of seventy-two percent, this Note concludes that the EEOC receives a considerably low level of deference.

Between the years 1964–1998, the Supreme Court delivered 28 cases involving deference to EEOC guidance.[86] The Court accepted the EEOC view in

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[85] According to Shuck and Elliot, who conducted an empirical survey of lower court deference cases, the leading case approach "is quite unsatisfactory" because "[i]t posits that the 'law' . . . can be captured in a few supposedly exemplary cases." *Id.* at 1060 (citation omitted). The leading case approach may be the only alternative when dealing with a discrete issue and a small sample of cases. Considering the large number of Supreme Court deference cases and the breadth of issues addressed in those cases, the leading case approach is inherently unreliable in determining deference trends.

[86] These cases were retrieved from WESTLAW (and double-checked with a LEXIS search). The search terms included "EEOC," "deference," "defer," "administrative," "regulation," "guidance," "guidelines," and various others. In an attempt to mirror Professor Merrill's methodology (which serves as the baseline for this data) I discarded numerous cases before arriving at a sample of 24. *See* Merrill, *supra* note 12 at 981 n.51 (discussing Merrill's system of categorizing agency deference cases). The following cases were discarded: (1) cases involving the validity of agency arguments advanced by the agency during adjudications; (2) "potential deference" cases, i.e., those in which the Court substitutes its own judgment for that of the agency without citing the agency's guidance or discussing the possibility of deference; (3) cases where agency guidance is challenged on the ground that it is adopted in an arbitrary and capricious manner; and (4) cases involving purely procedural rules adopted by the agency. Furthermore, in keeping with Professor Merrill's methodology, I adopted a selection principle that included all cases in which at least one Justice mentioned the possibility of deferring to an agency interpretation. Therefore, if the majority substitutes its own interpretation without mentioning the EEOC view, while a dissenting or concurring Justice points out that some EEOC guidance was relevant and deserving of deference, I placed these in the "not accepted" category. This occurred in the following cases: International Broth. of Teamsters v. United States, 431 U.S. 324, 390–91 (1977) (Marshall, J., dissenting) ("While the Court may have retreated from its prior view that interpretations are 'entitled to great deference,' I have not."); Washington v. Davis, 426 U.S. 229, 263 (1976) (Brennan, J., dissenting) ("[T]he construction of a statute by the agency charged with its administration is entitled to great deference."); Phillips v. Martin Marietta Corp., 400 U.S. 542, 545–46 (1971) (Marshall, J., concurring) ("[T]he Equal Employment Opportunity Commission['s] . . . regulations are entitled to great deference."). Likewise, if the majority did not rely upon EEOC guidance in its determination, but a concurring Justice pointed out that EEOC guidance would support the majority decision,

15 of those cases;[87] and rejected the EEOC view in 13 cases.[88] This yields a deference rate of approximately 54%. Compared to the baseline figure of 72%, this number is considerably low.[89] According to these statistics, one could fairly characterize the EEOC as a "second class agency," at least in the eyes of the Supreme Court.

The most obvious problem with the above sample is its small size.[90] However, it is important to note that the above survey targets a discrete sample of cases, *i.e.*, those in which the court is judging the validity of published EEOC

I then placed such a case in the "accepted" category because the Court's holding was ultimately consistent with the agency view. This occurred in only one case in my sample, Johnson v. Transp. Agency, 480 U.S. 616, 642–47 (1987) (Stevens, J., concurring) (citing McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 279–80 (1976)).

[87] For a complete list of cases in the "accepted" category, see *infra* app. A. I adopted a broad standard for determining whether the EEOC's view was "accepted." I included cases in which the court simply cited agency guidance in passing, without offering any special deference to that guidance. *See, e.g.*, County of Washington v. Gunther, 452 U.S. 161, 190 (1981) (Rhenquist, J., dissenting) ("[W]hat little legislative history there is on the subject ... and the contemporaneous interpretation of the EEOC ... indicates that Congress intended to incorporate the substantive standards of the Equal Pay Act into Title VII ...."). In such cases, the Court was operating in *independent*, not deferential mode, that is, it treated agency guidance no differently than other extrinsic aids such as legislative history. For a brief discussion of these two "modes," see Diver *supra* note 9, at 552–67. Nonetheless, even when operating in independent mode, the Court often reached the same decision as the agency. I would have preferred to exclude these cases altogether, because they do not represent the court in a deferential posture toward the EEOC. However, because Merrill separated cases according to whether the agency view was accepted or not accepted, and because his survey provides a baseline for my EEOC data, I included cases in the "acceptance" category as long as the agency view was consistent with the ultimate holding of the Court.

[88] For a complete list of cases in the "rejected" category, see app.B. A common reason for rejection of EEOC guidance, occurring in 5 out of 12 cases, is that the agency guidance conflicts with the plain language of its empowering statute. *See* app. B, Cases 3, 4, 6, 9, 11. The frequent use of this method of rejection supports Professor Merrill's theory that a textualist approach is excessively employed to discredit agency guidance. *See supra* note 17 (discussing Merrill's theory regarding the effect of textualism on agency deference). Another common justification for rejection of EEOC interpretations of Title VII was the fact that the EEOC has limited rulemaking power under Title VII. *See* app.B, Cases 1, 2, 4, 9.

[89] I specifically avoided the phrase "significantly low" because I did not wish to connote the more scientific notion of "statistical significance." I do not assert that the difference between a 54% and 72% deference rate *conclusively* establishes the EEOC's "second class" status. I only wish to point out that a 54% deference rate is suspect and thus, deserves further attention.

[90] No specific guidelines exist to determine the proper sample size for empirical legal research. From a sample of 25 cases, one cannot draw secure conclusions about legal trends. However, when examining a somewhat discrete class of Supreme Court cases, one cannot expect great quantity.

guidance (as opposed to the EEOC's adjudicatory positions). Thus, one cannot expect this sample to be large, especially since the EEOC is a relatively young agency, and the use of rulemaking as the primary means of agency expression did not fully develop until the late 1970s and early 1980s.[91]

Despite the fact that the above statistics may be incomplete, they do provide some perspective on the level of deference paid to the EEOC in comparison to overall agency deference. To supplement this empirical data, the remainder of this Note presents a more narrow inquiry of EEOC deference by focusing on the treatment of some discrete and controversial EEOC provisions.

IV. DEFERENCE TO EEOC INTERPRETATIONS OF TITLE VII, THE ADEA, AND THE ADA

For each of the statutes it administers, the EEOC has a specific grant of authority from Congress that defines its enforcement role. For each statute in the following sections, I begin by tracing the EEOC's level of authority, and proceed to discuss some of the most contentious deference issues arising from the statute and its administrative interpretations. I devote the bulk of the following analysis to the ADA, for it is the youngest statute from which many deference issues arise.

A. *Deference to EEOC Interpretations of Title VII*

The EEOC was born out of the Civil Rights Act of 1964.[92] Because of great tension surrounding the passage of the Act,[93] the EEOC's power was limited to "procedural regulations," not regulations with the force of law.[94] President Carter attempted to expand EEOC authority over Title VII through an executive order.[95] However, as one scholar noted, the order was ineffective because "[t]he

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[91] *See* STRAUSS, *supra* note 28, at 426 ("[T]he 1970s and early 1980s saw a dramatic shift away from agencies' traditional preference for case-by-case development of policy [i.e., adjudication].").

[92] *See* Pub. L. No. 88-352, Title VII § 705, 78 Stat. 258 (1964) (codified as amended at 42 U.S.C. § 2000e-4 (1994)) (providing for composition, duties, and powers of the EEOC).

[93] The Senate debate over the Civil Rights Act has been characterized as the "Longest Debate." *See* WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, LEGISLATION 17 (2d. ed. 1995).

[94] "The Commission shall have authority from time to time to issue, amend, or rescind suitable procedural regulations to carry out the provisions of this subchapter." 42 U.S.C. § 2000e-12(a) (1994). Perhaps in an effort to compensate for the EEOC's lack of rulemaking authority, Congress provides an exemption from liability under Title VII for a person acting "in reliance on any written interpretation or opinion of the [EEOC] . . . ." *Id.* § 2000e-12(b).

[95] Executive Order No. 12106, which was issued pursuant to Carter's Reorganization Plan No. 1 of 1978, stated that the "Equal Opportunity Employment Commission, after

President ... does not have the power to increase the stature of an executive agency's regulations; the delegation doctrine reserves that power for Congress."[96] Therefore, under Title VII, the EEOC is authorized to promulgate only interpretive or procedural guidelines and not regulations with the force of law.[97]

Despite the limits placed on EEOC rulemaking power, the Supreme Court held early EEOC guidance in high regard. This period of "great deference," however, was short-lived.

1. *The Era of "Great Deference"*

The Court generally treated the EEOC favorably in its early deference cases, but the EEOC was off to a slow start in *Phillips v. Martin Marietta Corp.*[98] This was the first case where the Court considered the issue of deference to EEOC guidance. It involved a claim of sex discrimination, which turned on the meaning of the Title VII exception for discrimination based on a "bona fide occupational

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consultation with all affected departments and agencies, shall issue such rules, regulations, orders, and instructions and request such information from the affected departments and agencies as it deems necessary and appropriate to carry out this Order." Exec. Order No. 12,106, 3 C.F.R. 263 (1979), *reprinted in* 42 U.S.C. § 200e-4nt (1994) (transferring administrative functions to the EEOC). This was the same plan that successfully transferred authority over the ADEA from the Department of Labor to the EEOC. *See* Reorg. Plan No. 1 of 1978, *supra* note 4 (discussing transfer of ADEA authority to EEOC).

[96] Colker, *supra* note 11, at 139. The idea that only Congress can grant rulemaking authority to an agency has its origins in Article I, Section I of the United States Constitution. "All legislative Powers herein granted shall be vested in a Congress...." U.S. CONST., art. I, § 1. The President, as the head of the Executive Branch, could *transfer* authority from one agency to another. In that situation, authority is not being created or destroyed—a power which lies only in congressional hands.

[97] The EEOC has promulgated interpretive guidelines targeted toward a discrete number of discrimination issues: *see* 29 C.F.R. § 1604 (1998) (sex); 29 C.F.R. § 1605 (1998) (religion); 29 C.F.R. § 1606 (1998) (national origin); 29 C.F.R. § 1607 (1998) (employee selection); and 29 C.F.R. § 1608 (1998) (affirmative action). Nearly all of these guidelines have proved contentious, but those addressing national origin are currently the subject of heated debate. *Compare* Lisa L. Behm, *Protecting Linguistic Minorities Under Title VII: The Need for Judicial Deference to the EEOC Guidelines on Discrimination Because of National Origin*, 81 MARQ. L. REV. 569, 571–72 (1998) (arguing that the resolution of the conflict over English-only rules "lies in judicial deference to EEOC guidance"); *with* David T. Wiley, *Whose Proof?: Deference to EEOC Guidelines on Disparate Impact Discrimination Analysis of "English-only" Rules*, 29 GA. L. REV. 539, 543 (1995) (arguing that, "contrary to EEOC guidelines, the complaining employee should bear the burden of proving an English-only rule has a disparate impact").

[98] 400 U.S. 542 (1971) (per curiam).

qualification" (BFOQ).[99] The majority ultimately attached a broad interpretation to the BFOQ exception—contrary to the narrow interpretation of the EEOC.[100] In concurrence, Justice Marshall objected to the majority's broad interpretation of the BFOQ exception and argued that the EEOC interpretation, which was entitled to "great deference," should have been controlling.[101]

In *Griggs v. Duke Power Co.*,[102] the majority did offer great deference to the EEOC.[103] The issue in *Griggs* was whether abilities targeted in employee performance tests had to be "significantly related to successful job performance."[104] The EEOC's position was that such tests must relate to "important elements of work behavior."[105] The Court found language in the statute and its legislative history which supported the EEOC view and stated that the EEOC guidelines were entitled to great deference.[106] Ultimately, the Court agreed with the EEOC,[107] concluding that Title VII precludes the use of testing

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[99] 42 U.S.C. § 2000e-2(e)(1) (1994).

[100] *See* Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.1 (1970). In these guidelines, the EEOC stated that the BFOQ exception should be construed narrowly, and cited numerous examples of situations that do not satisfy the exception. These situations include: (1) refusal to hire women based on the notion that the turnover rate for women is higher; (2) the notion that women are less able to assemble complex equipment or act as aggressive salespersons; (3) higher costs for providing separate facilities for both sexes. For a more comprehensive discussion of the BFOQ exception in the context of the *Phillips* case, see Moot, *supra* note 12, at 222–23 & nn.78–86.

[101] *See Phillips*, 400 U.S. at 545 (1971) (Marshall, J., concurring). The concurrence cited *Udall v. Tallman*, 380 U.S. 1, 16 (1965), in support of its "great deference" position. In *Udall*, the Court offered great deference to an interpretation by the Secretary of Interior. *See Udall*, 380 U.S. at 16 ("When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration.").

[102] 401 U.S. 424 (1971).

[103] *Id.* at 433–34 ("The administrative interpretations of the Act by the enforcing agency is entitled to great deference.").

[104] *See id.* at 426. The employer required a high school education and the passing of a standardized general intelligence test as a condition of employment, although neither standard was significantly related to successful job performance.

[105] *See id.* at 433 n.9 (citing and discussing EEOC Guidelines on Employee Testing Procedures, 29 C.F.R. § 1607.4(c) (1970)).

[106] *See id.* at 433–34.

[107] This language is not surplusage. The fact that the Court offered great deference does not mean it must ultimately agree with the guidelines. For example, in *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86 (1973), the Court articulated the great deference standard for EEOC guidance, which prohibited discrimination "on the basis of his citizenship" against a lawfully immigrated alien. *Id.* at 94. However, recognizing that "deference has its limits," and that finding that the guidelines conflicted with Congress's intent, the Court ultimately rejected the EEOC view. *Id.*

procedures which are not substantially job-related.[108]

A series of cases after *Griggs* revealed the Court's willingness to share interpretive responsibility over Title VII with the EEOC.[109] For example, in *Albemarle Paper Co. v. Moody*[110] the Court once again offered great deference to EEOC guidelines regarding employment tests.[111] It accorded such deference, despite the fact that the guidelines were not promulgated pursuant to formal procedures established by Congress,[112] because they constitute "[t]he administrative interpretations of the Act by the enforcing agency."[113]

2. *The Later Cases: Departure from Deferential Mode*

Beginning with *General Electric Co. v. Gilbert*,[114] the Supreme Court began to express some hostility toward EEOC guidance. The issue in *Gilbert* was whether discrimination on the basis of pregnancy constituted sex discrimination. The Court rejected EEOC guidelines which provided that disabilities caused by gender should be treated in the same manner as other temporary disabilities.[115]

The Court in *Gilbert* reasoned that because Congress "did not confer upon the EEOC the authority to promulgate rules or regulations pursuant to [Title

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[108] *See Griggs*, 401 U.S. at 436 ("Congress has forbidden . . . giving these devices and mechanisms controlling force unless they are demonstrably a reasonable measure of job performance.").

[109] *See* EEOC v. Commercial Office Prods. Co., 486 U.S. 107 (1988) (recognizing workshare agreements between the EEOC and state agencies); EEOC v. Associated Dry Goods Corp., 449 U.S. 590, 604 (1981) (deferring to EEOC regulations governing the disclosure of investigative information); Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 66 (1977) (deferring to EEOC guidelines regarding the "religious needs of . . . employees"); Albemarle Paper Co. v. Moody, 422 U.S. 405, 431 (1975) (finding that "EEOC guidelines . . . constitute '[t]he administrative interpretation of the Act by the enforcing agency,' and consequently they are 'entitled to great deference'") (citation omitted).

[110] 422 U.S. 405 (1975).

[111] *See id.* at 431.

[112] *See supra* note 58 (describing APA notice and comment requirements).

[113] *Albemarle Paper Co.*, 422 U.S. at 431. The Court, in essence, applies the earned deference standard to the guidelines because it offered deference to an interpretive rule with procedural infirmities.

[114] 429 U.S. 125 (1976), *reh'g denied*, 429 U.S. 1079 (1977).

[115] *See id.* at 143. The EEOC guideline at issue in *Gilbert* provides in pertinent part: "Disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom are, for all job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment . . . ." 29 C.F.R. § 1604.10(b) (1975).

VII],"[116] courts may accord "less weight to such guidelines than to administrative regulations which Congress has declared shall have the force of law."[117] The Court then applied the traditional *Skidmore v. Swift* factors[118] to determine the weight of the guidelines and found that the guideline in question "does not fare well under [those] standards."[119]

The extension of the *Skidmore* doctrine to the EEOC guideline in *Gilbert* may give the appearance of deference because the Court could did not substitute its own judgment in an entirely independent manner. However, the *Skidmore* test presents a situation of minimal deference.[120] The weight assigned to an agency guideline under *Skidmore* is dependent upon, inter alia, its "thoroughness" or "validity,"[121] which leaves great discretion to the reviewing Court. The bottom line in many cases in which *Skidmore* factors provide the appearance of deference is that the Court is not sharing its interpretive power with the agency. No such balance existed in *Gilbert*, nor in subsequent cases in which the Court continued to manifest its distrust of EEOC interpretations.[122]

Regardless of any criticism directed toward the Court's rejection of EEOC guidance in *Gilbert*,[123] one cannot overlook the fact that the EEOC's

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[116] *Gilbert*, 429 U.S. at 141.

[117] *Id.*

[118] 323 U.S. 134 (1944). The *Gilbert* Court articulated the *Skidmore* test as follows: "The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Gilbert*, 429 U.S. at 142 (citing *Skidmore*, 323 U.S. at 140).

[119] *Id.* at 142. The Court found that the guidelines were not rendered contemporaneously with the passage of Title VII, that they conflicted with earlier EEOC announcements, that legislative history conflicted with the EEOC position, and that the EEOC's interpretation of Title VII conflicted with the interpretation of the Wage and Hour Administrator who was charged with enforcement of the Equal Pay Act. *See id.* at 142–45.

[120] Professor Diver points out that *Skidmore* deference could be nothing more than "respectful or courteous regard" because the "pedigree" of the agency's argument adds nothing to the persuasive force inherent in its reasoning. *See* Diver, *supra* note 9, at 565. Therefore, even though *Skidmore* prescribes standards for determining weight, the agency's interpretation is not *inherently* more persuasive than any other argument placed before the court.

[121] *See Skidmore*, 323 U.S. at 140.

[122] *See, e.g.*, EEOC v. Arabian Am. Oil Co., 499 U.S. 244 (1991); Washington v. Davis, 426 U.S. 229 (1976); Espinoza v. Farah Mfg. Co., 414 U.S. 86 (1975); *see also* Yavelberg, *supra* note 11 (discussing trend of decreased agency deference after *EEOC v. Arabian American Oil Co.*, 499 U.S. 244 (1991)).

[123] *See Gilbert*, 429 U.S. at 157–58 (Brennan, J., dissenting) ("For me, the 1972 guideline represents a particularly conscientious and reasonable product of EEOC deliberations and, therefore, [it] merits our 'great deference.' Certainly, I can find no basis for concluding that the guideline is out of step with congressional intent.").

enforcement power over Title VII is inherently weak. Therefore, a lack of consistent deference to the EEOC in the Title VII context may be justified. A lack of deference to EEOC interpretations of the ADEA and ADA, however, cannot so easily be justified, because those interpretations are grounded in explicit congressional grants of authority.[124] As illustrated in the following section, the EEOC has not received significantly better treatment under the ADEA.[125]

B. *Deference to EEOC Interpretations of the ADEA.*

The Age Discrimination in Employment Act (ADEA)[126] was enacted in 1967 to prohibit age-based discrimination against older individuals in the terms or conditions of employment.[127] To carry out these goals, Congress explicitly delegated authority to the EEOC to promulgate rules with the force of law.[128] Enforcement power over the ADEA was originally vested in the Department of Labor, but was subsequently transferred to the EEOC by President Carter.[129] Despite this transfer of authority, the EEOC's rulemaking power under the ADEA remains strong.[130] Therefore, any EEOC *regulations* regarding the

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[124] *See supra* notes 3 and 4 (discussing statutory grants of authority to EEOC under the ADEA and ADA). Although the EEOC did receive rulemaking authority under the ADEA and ADA, the agency may still choose to promulgate interpretive rules, for which it does not *exercise* its delegated authority. Such rules are properly entitled to less weight.

[125] *See infra* Part IV.B (discussing deference to EEOC interpretations of ADEA).

[126] Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 602 (codified as amended at 29 U.S.C. §§ 621–634 (1994 & Supp. III 1997)).

[127] *See* 29 U.S.C. § 623(a) (1994).

[128] "[T]he Equal Employment Opportunity Commission may issue such rules and regulations as it may consider necessary or appropriate for carrying out this chapter, and may establish such reasonable exemptions to and from any or all provisions of this chapter as it may find necessary and proper in the public interest." 29 U.S.C. § 628 (1994). The EEOC regulations regarding the ADEA are codified at 29 C.F.R. §§ 1625–27 (1998).

[129] The ADEA was originally enforced by the Wage and Hour Division of the United States Department of Labor. In 1978, President Carter, acting pursuant to the Reorganization Act of 1977, 5 U.S.C. § 901 (1994), transferred ADEA enforcement power to the EEOC. *See* Reorg. Plan No. 1 of 1978, *supra* note 4 (transferring enforcement and regulatory power over the ADEA from Department of Labor to the EEOC).

[130] It would be futile to argue that President Carter exceeded his powers by simply transferring authority to the EEOC because the United States Constitution has vested in him the "executive Power." U.S. CONST. art. II, § 1, cl. 1. This "Power" would not allow him to *grant* rulemaking authority, but a mere *transfer* of Congress's delegated power has never been challenged on constitutional grounds. *See supra* notes 116–17 and accompanying text (discussing the principle that Congress, not the President, has the authority to grant rulemaking authority to the EEOC under Title VII).

ADEA, which comport with APA procedures, should be entitled to compelled deference.[131] As the following section illustrates, EEOC views with respect to the ADEA have not always received such deference.

1. *The Meaning of "Subterfuge" Under the ADEA*

Although age-based employment decisions are generally prohibited by the ADEA, an exemption exists in section 4(2) of the Act for "any bona fide employee benefit plan . . . which is not a *subterfuge* to evade the purposes of" the Act.[132] The EEOC adopted regulations which provided that plans would qualify for the exemption (*i.e.*, would not be considered a "subterfuge") only if age-related reductions in benefits are justified by actuarial data that reveals the increased cost of providing such benefits to older workers.[133] The Supreme Court has persistently rejected this interpretation of "subterfuge."

The Supreme Court first adopted its definition of the ADEA term "subterfuge" in *United Air Lines, Inc. v. McMann.*[134] *McMann* addressed the lawfulness of a mandatory retirement plan adopted *prior* to enactment of the ADEA, which turned on the definition of subterfuge in the ADEA safe harbor provision. The Court adopted the following dictionary definition of subterfuge: "a scheme, plan, stratagem, or artifice of evasion."[135] In the context of section 4(2), the Court reasoned that this definition connotes a specific "intent . . . to

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[131] As a reminder, compelled deference, means that a court should pay deference to agency interpretations promulgated pursuant to the APA, and grounded in an express congressional grant, unless they are arbitrary, capricious, or manifestly contrary to the statute. *See supra* notes 47–53 and accompanying text (discussing the compelled deference standard). However, the majority of the Supreme Court does not apply the compelled deference standard to interpretive rules. *See supra* note 56 and accompanying text (discussing Scalia's disagreement with exclusion of interpretive rules from *Chevron* deference).

[132] 29 U.S.C. § 623(f)(2) (1994) (emphasis added). This exemption is commonly known as a "safe harbor" provision. For a discussion of the subterfuge issue in the context of the ADEA, see James J. Brudney, *Congressional Commentary on Judicial Interpretations of Statutes: Idle Chatter or Telling Response?*, 93 MICH. L. REV. 1, 11–16 (1994).

[133] The precise language of the regulations defining "subterfuge" is as follows: "In general, a plan or plan provision which prescribes lower benefits for older employers on account of age is not a 'subterfuge' within the meaning of section 4(f)(2), provided that the lower level of benefits is justified by age-related cost considerations." 29 C.F.R. § 1625.10 (1998). The Department of Labor formulated this rule, and subjected it to notice and comment in 1969. *See* 29 C.F.R. § 860.120(a) (1970). After the EEOC received enforcement authority in 1978, it retained the rule in its 1979 regulations, which were also subjected to notice and comment. *See* 29 C.F.R. § 1625.10 (1998).

[134] 434 U.S. 192, 203 (1977).

[135] *Id.* at 203.

evade a statutory requirement."[136] Because the challenged plan was implemented *before* the ADEA was passed, plaintiffs could not logically establish that it was specifically intended as a subterfuge to evade the Act.[137] Accordingly, plaintiffs failed to satisfy the intent requirement in the Court's definition of subterfuge and were denied any relief.

Congress disagreed with this holding, and amended the ADEA to state that the bona fide plan exemption did not apply to plans that "require or permit the involuntary retirement of any individual" because of his or her age.[138] However, Congress did not remove the word subterfuge from the exemption, and thus paved the way for another controversial Supreme Court decision.

The Court revisited the subterfuge issue eleven years later in *Public Employees Retirement System of Ohio v. Betts*.[139] The Court was faced with the question of adopting the *McMann* definition of subterfuge and its implied intent requirement or deferring to the EEOC cost justification rule. The question arose from the following facts. Ohio adopted a retirement plan for its public sector employees that did not pay disability benefits for employees retiring after age fifty-nine.[140] Under this plan, June Betts, who retired with a disability at age sixty-one, could receive standard retirement benefits but not disability benefits (which were much higher).[141]

Betts filed an age discrimination charge against Public Employment Retirement System (PERS) with the EEOC, and filed suit in the United States District Court for the Southern District of Ohio, claiming that PERS' refusal to pay disability retirement benefits violated the ADEA.[142] The Supreme Court granted certiorari after two lower court decisions favoring Betts.[143] It held that

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[136] *Id.*

[137] *See id.* ("[A] plan established in 1941, if bona fide, . . . cannot be a subterfuge to evade an Act passed 26 years later.").

[138] Age Discrimination in Employment Act Amendments of 1978, Pub. L. 95-256, §§ 2(a), 623 (f)(2), 92 Stat. 189, 189 (1978) (amending the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 623(f)(2)).

[139] 492 U.S. 158, 169 (1989).

[140] *See Betts*, 492 at 158.

[141] The Ohio plan was amended in 1976 to establish a floor amount for disability benefits at 30% of the retiree's final average salary. *See id.* at 163. Consequently, the disability retirement plan would have paid Betts $355 per month, while the standard retirement payments (referred to as "age-and-service" payments) yielded only $158.80 per month. *See id.*

[142] *See id.* at 163–64.

[143] Both lower courts in *Betts* deferred to the EEOC view, and concluded that PERS was not entitled to the bona fide plan exemption. *See* Betts v. Hamilton County Bd. of Mental Retardation, 631 F. Supp. 1198, 1202–05 (S.D. Ohio 1986), *aff'd*, Betts v. Hamilton County Bd. of Mental Retardation and Dev. Disabilities, 848 F.2d 695 (6th Cir. 1988).

the term subterfuge must be given its "ordinary meaning" (or dictionary definition) as assigned in *McMann*.[144] Because this definition "includes a subjective [intent] element that the regulation's objective cost-justification requirement fails to acknowledge," the Court rejected the EEOC rule as "inconsistent[ ] with the plain language of the statute."[145]

The fate of the EEOC guidelines in *Betts*, like many other Supreme Court deference cases, was determined by the first step of *Chevron*—the plain meaning test.[146] However, this is a questionable interpretation of *Chevron*. First, *Chevron* provides that, if *Congress*—(not the Supreme Court or Webster's Dictionary) has spoken clearly to the issue, then reference to agency guidance is not appropriate.[147] Congress did not speak clearly to the meaning of subterfuge; it only listed the word. In essence, the Court in *Betts* found that the EEOC's position was inconsistent with a "subjective element," which was inferred from a dictionary definition of subterfuge.[148] This subordination of EEOC guidance in the process of statutory interpretation is hardly a proper application of *Chevron*'s plain meaning rule.[149]

The second flaw in the Court's reasoning arises from the Court's examination of legislative history, even after declaring that the plain statutory meaning precluded agency deference.[150] After rejecting EEOC guidance, the Court turned to the legislative history to solve the "difficult task of determining

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144 "As Congress did not amend the relevant statutory language, we see no reason to depart from our holding in *McMann* that the term 'subterfuge' is to be given its ordinary meaning...." *Betts*, 492 U.S. at 168.

145 *Id.* at 171.

146 *See* Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842 (1984). "[N]o deference is due to agency interpretations at odds with the plain language of the statute itself.... Even contemporaneous and longstanding agency interpretations must fall to the extent they conflict with statutory language." *Betts*, 492 U.S. at 171.

147 *See Chevron*, 467 U.S. at 842–43.

148 *Betts*, 492 U.S. at 171.

149 Professor James J. Brudney, in his critical analysis of *Betts*, focuses on the Court's disregard of legislative history. He noted that a conference report accompanying the 1978 amendment to the ADEA that explicitly disapproves of the McMann definition of subterfuge "was deemed inconsequential because Congress had failed to amend the subterfuge *text*." *See* Brudney, *supra* note 132, at 15. Thus, the Court not only subordinated EEOC guidance, but also a clear statement of intent from ADEA legislative history.

150 Application of the plain meaning doctrine precludes not only inquiry into agency interpretation but also legislative history. *See* Danial A. Farber & Phillip P. Frickey, *Legislative Intent and Public Choice*, 74 VA. L. REV. 423, 438–39 (1988) (quoting then Judge Scalia's criticism of legislative history and its "system of committee-staff prescription" in *Hirschey v. Federal Energy Regulatory Commission*, 777 F.2d 1, 7–8 (D.C. Cir. 1985) (Scalia, J., concurring)).

the precise meaning of [subterfuge],[151] and ultimately found conflict between the EEOC view and Congress's intent as expressed in legislative history. However, if the plain meaning of subterfuge was clear enough to justify rejection of the EEOC view, then the court should not need to refer to legislative history.

Justice Marshall, in dissent, recognized that the statutory language was not clear, and turned to sources such as legislative history and agency guidance to resolve the ambiguity.[152] After concluding that the EEOC guidelines *were* consistent with ADEA legislative history, Justice Marshall argued that the EEOC position was entitled to deference.[153] He then boldly accused the Court of inconsistent application of its deference standard when "important civil rights laws are at issue. . . ."[154]

2. *Congressional Override of* Betts

On October 16, 1990, President Bush signed into law the Older Workers Benefit Protection Act of 1990 (OWBPA).[155] Title I of the OWBPA amended the ADEA for the purpose of overruling the *Betts* decision.[156] In light of the OWBPA, section 4(2) of the ADEA now permits use of the bona fide benefit plan exemption only when "the actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker. . . ."[157] This amendment comports with EEOC guidelines which were disregarded in the *Betts* decision.[158] The OWBPA also made clear that the amended ADEA subsection 4(f)(2) is an affirmative defense which shall apply regardless of the date when the disputed benefit plan was adopted (overruling *McMann*), and as to which the employer shall have the burden of

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[151] *See Betts*, 492 U.S. at 175.

[152] Justice Marshall noted that "[t]his is a case in which only so much blood can be squeezed from the textual stone, and in which one therefore must turn to other sources of statutory meaning." *Id.* at 187 (Marshall, J., dissenting).

[153] *See id.* at 192–93 (Marshall, J., dissenting).

[154] *Id.* at 193 (Marshall, J., dissenting). The precise language of his accusation was: "The majority's derogation of [the EEOC guidelines] leaves one to wonder why, when important civil rights laws are at issue, the Court fails to adhere with consistency to its so often espoused policy of deferring to expert agency judgment on ambiguous statutory questions." *Id.* Earlier in his dissenting opinion, Justice Marshall also commented that the majority's reasoning is "so manipulative as virtually to invite the charge of result-orientation." *Id.* at 185.

[155] Older Workers Benefit Protection Act of 1990, Pub. L. No. 101-433, 104 Stat. 978–84 (codified as amended at 29 U.S.C. §§ 621, 623, 626, 630 (1994 & Supp. III 1997).

[156] *See* John R. Runyan, *Hedging Betts: The Older Workers Benefit Protection Act*, 72 MICH. B.J., Feb. 1993, at 168, 171 (discussing Congressional override of *Betts*).

[157] 29 U.S.C. § 623(f)(2)(B) (1994).

[158] *See* 29 C.F.R. § 1625.10 (1998) (articulating the cost-justification rule).

proof (overruling *Betts*).[159]

One lesson to be learned from the OWBPA is that the entire effort would have been unnecessary had the Court given proper deference to EEOC guidance. It is simply wasteful to require Congress to spend time redressing an issue that it originally intended the agency to resolve.[160]

It appears that courts interpreting the ADEA have observed the congressional mandate embodied in the OWBPA.[161] However, when the same issue arose under the ADA,[162] many courts followed the *Betts* decision. At present, a split exists in the lower courts as to the validity of EEOC guidelines interpreting the ADA term subterfuge. The following sections explore this issue (perhaps the most contentious ADA deference issue in the courts today), and other problems associated with EEOC interpretations of the ADA.

C. *Deference to EEOC Interpretations of the ADA*

Because of its youth, the ADA and its EEOC guidelines present many difficult interpretive problems for the courts. The following sections focus on two such problems. First, the "mitigating measures" rule, which the EEOC has adopted to clarify the meaning of the ADA phrase "substantial limitation," had caused a major split in lower federal courts. The split was nearly resolved by the circuit courts *in favor* of deference to the rule. However, the Supreme Court in *Sutton v. United Airlines, Inc.*,[163] recently rejected the EEOC view with regard to mitigating measures.[164]

The primary reason for a discussion of the mitigating measures rule is to provide context for a second, more contentious issue: the meaning of subterfuge under the ADA. Very few circuit courts have addressed this issue, but a clear split is emerging.

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[159] *See* Runyan, *supra* note 156 (discussing affirmative defense and burden of proof amendments to Subsection 4(f)(2) of the ADEA).

[160] Professor James J. Brudney points out that the process of overruling *Betts* was a lengthy and controversial one. *See* Brudney, *supra* note 132, at 17–19.

[161] Numerous courts have recognized that *Betts* has been superseded by the OWBPA. *See, e.g.*, EEOC v. Mass., 77 F.3d 572, 573 (1st Cir. 1996); American Ass'n of Retired Persons v. Farmers Group, Inc., 943 F.2d 996 (9th Cir. 1991); EEOC v. Westinghouse Elec. Corp., 925 F.2d 619 (3d Cir. 1991).

[162] For better or worse, Congress used the same term in the ADA in a similar "safe harbor" provision. *See infra* Part IV.C.2 (discussing the subterfuge issue in the context of the ADA).

[163] 119 S. Ct. 2139 (1999).

[164] *See id.* at 2151.

1. *Judicial Deference to the Mitigating Measures Rule*

The mitigating measures rule is located in the EEOC "Interpretive Guidance" as an appendix to the ADA regulations.[165] The EEOC has clear congressional authority under the ADA (unlike Title VII) to issue *regulations* with the force of law[166] and such regulations undoubtedly trigger *Chevron*'s compelled deference standard. As to interpretive guidance, the deference standard is less clear. Both the form and substance of the guidance will be relevant to its ultimate categorization.

In form, this "Interpretive Guidance" does not appear to qualify for compelled deference for the simple reason that it is not a "regulation."[167] However, numerous factors cast doubt on this proposition. First, the label of an agency rule, although relevant, is not always dispositive as to its substance.[168] Second, the Guidance was set forth as an appendix to the regulations—not as a separate body of rules.[169] The existence of an appendix merely indicates that an agency is interpreting its own regulations, not that the agency is imposing entirely new rules in addition to the regulations. In fact, the D.C. Circuit has recognized that an agency interpretation of its own regulations is entitled to more weight than its interpretation of an ambiguous statutory term.[170] Therefore, the fact that the guidance is in appendix form may allow an inference, albeit weak, that the EEOC was attempting to exercise its delegated rulemaking authority.[171]

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[165] *See* 29 C.F.R. 1630, app. § 1630.2(h) (1998).

[166] *See* 42 U.S.C. 12116 (1994) (authorizing the EEOC to issue guidelines implementing Title I of the ADA).

[167] Recall that *Chevron* only applies to "legislative regulations." *See supra* Part II.B.

[168] *See* General Motors Corp. v. Ruckelshaus, 742 F.2d 1561, 1565–66 (D.C. Cir. 1984) ("The agency's own label, while relevant, is not dispositive.... [I]f by its action the agency intends to create new law, rights or duties, the rule is properly considered to be a legislative rule.") (citations omitted).

[169] The regulations and interpretive guidance share corresponding citations. For example, the regulation "28 C.F.R. § 1630" will correspond to "28 C.F.R. § 1630, app." in the interpretive guidance. Each section of Interpretive Guidance simply expounds on its corresponding regulation.

[170] *See* Birt v. Surface Trans. Bd., 90 F.3d 580, 589 (D.C. Cir. 1996) (stating that "precedent firmly establishes that courts' owe even greater deference to agency interpretations of agency rules than ... to agency interpretations of ambiguous statutory terms.'") (quoting Capital Network Sys., Inc. v. FCC, 28 F.3d 201, 206 (D.C. Cir. 1994)).

[171] The fact that the guidance is in appendix form lead to a contrary inference in *Matzak v. Frankford Candy & Chocolate Co.*, 136 F.3d 933 (3d Cir. 1997). The court noted that "The EEOC's guidelines constitute an appendix to the regulations and therefore do not command the same degree of deference as the regulations themselves." *Id.* at 937. The court in *Matzak* ultimately decided to give the EEOC interpretive rule "'controlling weight unless it is plainly

A third reason for placing the interpretive guidance into the legislative category is that it was subjected to notice and comment pursuant to the APA.[172] This is probably the most compelling argument for treating EEOC interpretive guidance as a body of legislative rules, because the agency was not *obligated* to follow that procedure.[173] The fact that the EEOC followed the notice and comment procedure for its Interpretive Guidance suggests that it was attempting to exercise its delegated rulemaking authority.

Even if the guidance is deemed "interpretive" in form, its substance may suggest otherwise.[174] The substantive value of a rule may turn on the impact of the rule upon the rights and duties of individuals.[175] The impact of the mitigating measures rule would be abstract if discussed here.[176]

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erroneous or inconsistent with the regulations.'" *Id.* (citing Thomas Jefferson Univ. v. Shahala, 512 U.S. 504, 512 (1994)).

[172] Section 553 of the APA sets forth the notice and comment requirements. Under this procedure, informal rules must be published in the Federal Register (the notice element) so that interested parties or entities can offer criticism or suggestions (the comment element). *See* 5 U.S.C. §§ 553(b), 553(c) (1998). On August 1, 1990, the EEOC issued *advance* notice of its proposed rule regarding the definition of ADA terms such as "disability," "reasonable accommodation," and "undue hardship." *See* Title I of Americans with Disabilities Act; Implementation, 55 Fed. Reg. 31192 (1990) (to be codified at 29 C.F.R. pt. 1630)(advanced notice of proposed rulemaking Aug. 1, 1990). Six months later, it issued its final notice of proposed rulemaking which included both the regulations and interpretive guidance. *See* Equal Employment Opportunity for Individuals with Disabilities; Notice of Proposed Rulemaking, 56 Fed. Reg. 8586–8603 (1991) (to be codified at 29 C.F.R. pt. 1630) (proposed Feb. 28, 1991). On July 26, 1991, after an extensive comment and amendment process, the EEOC published the final version of its rules. *See* Equal Employment Opportunity for Individuals with Disabilities, 56 Fed. Reg. 35726–56 (1991) (to be codified at 29 C.F.R. pt. 1630) (final rule).

[173] Interpretive rules are categorically exempt from the APA notice and comment requirement. *See* 5 U.S.C. § 553(b)(A) (1994).

[174] Recall the debate discussed above regarding the characterization of "legislative" or "interpretive" rules. Some cases and scholars focus on the origin of the rule (e.g., its nomenclature and form), while others focus on the impact of the rule. This debate is entirely relevant to ADA interpretive guidance, which in form appears to be interpretive, but in substance, resembles a legislative rule. *See supra* Part II.C. (discussing the distinction between legislative and interpretative rules).

[175] *See* Chrysler Corp. v. Brown, 441 U.S. 281, 302 (1979) ("We described a substantive rule—or a 'legislative-type rule,'—as one 'affecting individual rights and obligations' . . . This characteristic is an important touchstone for distinguishing those rules that may be 'binding' or have the 'force of law.'") (quoting Morton v. Ruiz, 415 U.S. 199, 236 (1974)).

[176] However academic the distinction between legislative and interpretive rules may seem, it may be critical in a deference context. If the guidance is deemed legislative, then it almost automatically triggers the compelled deference standard. If not, the earned deference standard would apply. *See supra* Parts II.A and II.B (discussing, respectively, earned and

The mitigating measures rule is used both to determine whether an individual's physiological disorder constitutes a physical impairment, and whether that impairment substantially limits one or more major life activities of the individual. As to whether a person is *impaired* under the ADA, the interpretive guidance states that "[t]he existence of an impairment is to be determined without regard to mitigating measures such as medicines, or assistive or prosthetic devices."[177] A similar rule applies as to whether the impairment satisfies the substantial limitation requirement: "The determination of whether an individual is substantially limited in a major life activity must be made on a case by case basis, without regard to mitigating measures . . . ."[178] Therefore, under the EEOC rule, a physiological disorder will be considered an impairment, and the impairment will be substantially limiting, even if mitigating measures can completely control the disorder.[179]

One example of nearly complete mitigation is an insulin-dependent diabetic who regularly takes insulin. Without the measures, the person would likely lapse into a coma and die. With the measures, he or she leads a normal, and seemingly "unlimited" lifestyle.[180] Under the EEOC rule, however, the person is still considered "disabled," because it mandates that insulin cannot be considered in the disability equation. This result is certainly controversial and much ink has been spilled on its policy implications.[181] This Note does not explore those implications in depth,[182] but does focus on the level of deference paid to the rule

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compelled deference standards).

[177] 29 C.F.R. § 1630.2(h), app. (1999).

[178] 29 C.F.R. § 1630.2(j), app. (1999).

[179] Numerous sources of ADA legislative history provide clear support for this view. *See* H.R. Rep. No. 101-485(II), at 53, *reprinted in* 1990 U.S.C.A.A.N. 303, 334 ("Whether a person has a disability should be assessed without regard to the availability of mitigating measures . . . .") (House Education and Labor Committee). The other two relevant committee reports contain nearly identical language. *See* H.R. Rep. No. 101-485(III), at 28–29 (1990), *reprinted in* 1990 U.S.C.A.A.N. 445, 451 (Judiciary Committee); S.Rep. No. 101-116, at 23 (1989) (Labor and Human Resources Committee). Nothing in the legislative history suggests any disagreement with this position.

[180] The mitigated diabetic issue has prompted numerous ADA cases. *See, e.g.*, Arnold v. United Parcel Serv., Inc., 136 F.3d 854, 863–64 (1st Cir. 1998) (granting standing to an insulin-dependent diabetic, and reversing the lower court decision to disregard mitigating measures rule); Gilday v. Mecosta County, 124 F.3d 760 (6th Cir. 1997) (reversing and remanding over the question of whether non insulin-dependent diabetic was disabled).

[181] *See, e.g.*, Recent Cases, *Statutory Interpretation—Americans with Disabilities Act—Tenth Circuit holds that Courts Should Consider Mitigating Measures in Evaluating Disability.—Sutton v. United Air Lines, Inc.*, 130 F.3d 893 (10th Cir. 1997), 111 HARV. L. REV. 2456, 2460–61 (1998).

[182] One logical policy argument in favor of the rule is that, without it, employers could

both in the past and present.

One procedural problem with the mitigating measures rule, which surprisingly has not yet been mentioned by any appellate courts addressing its validity (even the ones that rejected it),[183] is the fact that the EEOC's original notice publication only included the rule as it applied to impairments, not to substantial limitation.[184] The rule was not included in the substantial limitation section of the guidance until the final draft.[185] Thus, from a strict procedural perspective, the mitigating measures rule with regard to "substantially limits" has failed the APA notice requirement, even though it was amended in direct response to the comment process.[186]

Although the notice draft did not explicitly mention mitigating measures, it did contain the following example: "A diabetic who without insulin would lapse into a coma would be substantially limited because the individual can only perform major life activities with the aid of medication."[187] As one scholar points out, this language implied that the consideration of whether someone is substantially limited should be made without regard to mitigating measures.[188]

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institute treatment in order to remove individuals from the ADA protection. Once the employee is cured, the employer could fire him or her with impunity. One logical argument against the rule is the fact that it could open the floodgates for ADA plaintiffs who experience no debilitating symptoms of their conditions.

[183] One appellate court appeared to understate the procedural soundness of the interpretive guidance. *See Arnold*, 136 F.3d at 864 ("We recognize that the EEOC interpretive guidelines are not controlling in the way that regulations promulgated pursuant to the Administrative Procedure Act are controlling.") (citing 5 U.S.C. § 552 (1994 & Supp. IV 1998)). Even though the court ultimately accepted the EEOC position, it did not mention the fact that the interpretive guidance was subjected to notice and comment pursuant to Section 553 of the APA*ee* 5 U.S.C. § 553(b) (1994).

[184] *See* Equal Employment Opportunity for Individuals with Disabilities; Notice of Proposed Rulemaking, 56 Fed. Reg. 8586–8603 (1991) (to be codified at 29 C.F.R. pt. 1630) (proposed Feb. 28, 1991) (stating mitigating measures rule with regard to impairments).

[185] "The Commission has revised the interpretive guidance accompanying § 1630.2(j) to make clear that the determination of whether an impairment substantially limits one or more major life activities is to be made without regard to... mitigating measures." *See* Equal Employment Opportunity for Individuals with Disabilities, 56 Fed. Reg. 35,726, 35,727 (1991) (to be codified at 29 C.F.R. pt. 1630) (final rule).

[186] The EEOC states that the amendments to the substantial limitation section were in response to comments by disability rights groups that requested clarification of the substantial limitation requirement. *See id.* at 35,728.

[187] Equal Employment Opportunity for Individuals with Disabilities; Notice of Proposed Rulemaking, 56 Fed. Reg. at 8593.

[188] *See* Colker, *supra* note 11, at 154–55.

The issue of deference to the mitigating measures rule created a great rift in the district courts, but the circuit courts appeared much more deferential.[189] The issue has been addressed in a total of sixteen appellate cases.[190] Of those cases, only three resulted in a rejection of the mitigating measures rule.[191] Of the

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[189] Most of the district court cases represented in my sample resulted in *rejection* of the mitigating measures rule. Of the 13 circuit court cases in my sample resulting in acceptance of the rule, 9 of those cases were reversals of a district court decision to *reject* the rule; and all 3 of the circuit court cases resulting in rejection of the rule were affirmances of a similar district court decision. Therefore, in the vast majority (approximately 75%) of district court decisions that were reviewed in my sample of appellate cases, the result was a rejection of the mitigating measures rule. Although numerous other district court cases not represented in my appellate sample have considered the mitigating measures issue, one can safely infer from this data that district courts were generally more hostile to the rule than circuit courts (at least until they were reversed). I did review the entire district court record briefly to confirm this conclusion. From this admittedly cursory search, it appeared that most district courts did reject the rule, although it seemed quite wasteful to conduct a detailed empirical analysis of those cases, especially since most of the those cases are no longer good law.

[190] To gather the initial cite list, I searched for "mitigating measures" in the WESTLAW ALLCIR database in early January of 1999. I excluded "unpublished" opinions from my sample. The reason for this exclusion is not only because of the weak precedential value of those opinions, but also because certain circuits make their opinions available and others do not. Thus, if I included all unpublished decisions, then the views of one circuit that disseminates its unpublished decisions to electronic sources (e.g., the Sixth Circuit), would be more represented in my sample than a circuit that does not (e.g., the Third Circuit). In light of these problems, I excluded unpublished decisions altogether. It is important to note that unpublished opinions are valuable for statistical analysis, especially when determining legal trends from a relatively small sample of published opinions. Some scholars are quite interested in obtaining unpublished opinions for their research, or at least, in determining how many opinions they *cannot* obtain in order to speculate on rate of error. In a study I conducted on behalf of Professor Ruth Colker at The Ohio State University College of Law in May of 1998, I examined the practices of all circuit courts regarding the availability of their unpublished opinions. I will not subject the reader to the results of that study, but Professor Colker does summarize them in her most recent article. *See* Colker, *supra* note 11 at nn. 26–38 & app. A. For a complete list of the cases resulting in both acceptance and rejection of the mitigating measures rule, see apps. C & D.

[191] The following cases resulted in rejection: Sutton v. United Airlines, Inc., 130 F.3d 893, 899 n.3 (10th Cir. 1997) ("[A]lthough we give great deference to the EEOC's interpretation of the ADA found in the regulations promulgated under the express authority of Congress and the ADA itself, we do not do the same for interpretive guidance promulgated under the [APA]. . . . Hence, while the EEOC's Interpretive Guidance may be entitled to some consideration in our analysis, it does not carry the force of law and is not entitled to any special deference [under *Chevron*]"); Gilday v. Mecosta County, 124 F.3d 760, 766 (6th Cir. 1997) (Kennedy, J., concurring) ("[T]he EEOC's rule on mitigating circumstances conflicts with the text of the ADA and is, therefore, not a 'permissible construction of the statute.'") (citing Reno v. Koray, 515 U.S. 50, 61 (1995)); Ellison v. Software Spectrum, Inc., 85 F.3d 187, 191 n.3 (5th Cir. 1996) ("[H]ad Congress intended that substantial limitation be determined without

thirteen cases in which the rule was *not* rejected, the amount of deference paid to the rule varied widely from "controlling weight,"[192] to "considerable weight,"[193] to "some weight."[194] In many of these thirteen cases, the courts did not explicitly address the issue of deference; rather, they merely cited the EEOC rule and applied facts of the case directly to that rule.[195] These cases may arguably exhibit the highest possible deferential standard because they seem to accept EEOC guidance without question or controversy.[196]

Despite the overwhelming number of appellate cases accepting the EEOC view, the Supreme Court went the other way. In *Sutton v. United Airlines, Inc.*,[197] the Court determined that the EEOC view with regard to mitigating measures "is an impermissible interpretation of the ADA."[198] *Sutton* involved two severely myopic job applicants who were denied employment as United Airlines pilots because they did not meet United's minimum vision requirements.[199] Their vision was entirely correctable, but under the EEOC rule, a court must determine disability status without regard to any corrective or mitigating measures. It seems intuitive that the mitigating measures rule should not apply to simple myopia. However, the Court did more than deactivate the

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regard to mitigating measures, it would have provided for coverage under [42 U.S.C. § 12102(2)(A) (1998)] for impairments that have the *potential* to substantially limit a major life activity.").

[192] Matzak v. Frankford Candy & Chocolate Co., 136 F.3d 933, 937 (3d Cir. 1997) ("[W]e must give the EEOC's interpretation of its own regulations 'controlling weight unless it is plainly erroneous or inconsistent with the regulation[s].'") (citing Thomas Jefferson Univ. v. Shahala, 512 U.S. 504, 512 (1994)).

[193] Harris v. H & W Contracting Co., 102 F.3d 516, 521 (11th Cir. 1996) ("The Supreme Court has long recognized that an agency's interpretation of a statute it is entrusted to administer should be given 'considerable weight' and should not be disturbed unless it appears from the statute or legislative history that Congress intended otherwise.") (citing Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844–45 (1984)).

[194] Arnold v. United Parcel Serv., Inc., 136 F.3d 854, 864 (1st Cir. 1998) ("[EEOC interpretive guidelines] deserve at least as much consideration as a mere 'internal agency guideline,' which the Supreme Court has held is entitled to 'some deference' as long as it is a permissible construction of the statute.") (citing Reno v. Koray, 515 U.S. 50, 61 (1995)).

[195] *See, e.g.*, Baert v. Euclid Beverage, Ltd., 149 F.3d 626, 629–31 (7th Cir. 1998); Holihan v. Lucky Stores, Inc., 87 F.3d 362, 366 (9th Cir. 1996); Burch v. Coca-Cola Co., 119 F.3d 305, 317 (5th Cir. 1997); Foreman v. Babcock & Wilcox Co., 117 F.3d 800, 805–06 (5th Cir. 1997).

[196] Logically it would be more deferential for a court to simply cite and apply an EEOC rule, than to engage in a lengthy and often confusing deference analysis, which could be misconstrued or disagreed with by future litigants or courts.

[197] 119 S. Ct. 2139 (1999).

[198] *Id.* at 2146.

[199] *See id.* at 2143.

EEOC rule within the context of myopia. It entirely invalidated the mitigating measures rule, regardless of the impairment to which it applies. This blunt measure adopted by the Supreme Court could affect the level of deference paid to the EEOC "subterfuge" rule.

2. *"Subterfuge" Under the ADA*

The ADA subterfuge issue is complex and requires careful explanation.[200] The applicability of Title I to employer-provided health insurance is affected by two incompatible goals: the elimination of discrimination based on disability, and the preservation of affordable employee health insurance plans.[201] To accomplish the first goal, Congress enacted Title I of the ADA, which prohibits discrimination in all aspects of employment.[202] Subsequent EEOC regulations extended that protection to the broad category of "fringe benefits,"[203] however, the EEOC limits the application of its interim guidance to *only* employer-provided health insurance plans.[204] Thus, through a combination of statutory and regulatory action, the ADA prohibits disability-based distinctions in employer-provided health plans.

Congress attempted to accomplish the second goal of preserving affordable health insurance through the creation of a statutory exemption (or "safe harbor" provision) for certain distinctions in employer-provided health plans.[205] Section

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[200] For a brief overview of the issue, see Brudney, *supra* note 132, at 199 n.395.

[201] *See* CCR REPORT ON ADA TITLE I, *supra* note 1, at 134.

[202] *See* 42 U.S.C. 12112(a) (1994) ("No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.").

[203] *See* 29 C.F.R. § 1630.4(f) (1998) ("It is unlawful for a covered entity to discriminate on the basis of disability against a qualified individual with a disability in regard to: . . . (f) Fringe benefits available by virtue of employment, whether or not administered by the covered entity.").

[204] *See* Interim Enforcement Guidance on the Application of the Americans With Disabilities Act of 1990 to Disability-Based Distinctions in Employer-Provided Health Insurance, EEOC Coml. Man. (BNA) No. N-915.002, at 2 (June 8, 1993) [hereinafter EEOC Interim Guidance on Health Insurance]. The fact that the EEOC voluntarily limited the scope of its guidance could increase the inherent weight of the guidance in the eyes of a court, because this suggests that EEOC fact-finding and deliberation was narrowly focused toward a discrete issue.

[205] This exemption was a natural response to efforts by insurers to cut costs by differentiating between, and offering disparate levels for, particular health conditions. *See* H. Miriam Farber, Note, *Subterfuge: Do Coverage Limitations and Exclusions in Employer-Provided Health Care Plans Violate the Americans with Disabilities Act?*, 69 N.Y.U. L. REV. 850, 851–52 (1994).

501(c) of the ADA exempts certain "bona fide" benefit and insurance plans from the general restrictions of the Act.[206] However, employers or entities cannot receive safe harbor when their plans are used as a "subterfuge to evade the purposes" of the ADA.[207]

Again, the obvious problem arising from the section 501(c) provision is that the meaning of subterfuge is not self-evident. As the Sixth Circuit once noted, section 501(c) is "totally ambiguous on its face."[208] This ambiguity necessarily leads a reviewing court to outside sources to ascertain the proper meaning of subterfuge. Therefore, the question in ADA subterfuge cases becomes: what is the *best* outside authority on the meaning of or congressional intent behind the word subterfuge? Is it Congress, speaking through legislative history; the

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[206] Section 501(c), under the title "Insurance" provides:

> Titles I through IV of this Act shall not be construed to prohibit or restrict—
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> (1) an insurer, hospital or medical service company, health maintenance organization, or any agent, or entity that administers benefit plans, or similar organizations from underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law; or
>
> (2) a person or organization covered by this chapter from establishing, sponsoring, observing or administering the terms of a bona fide benefit plan that are based on underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law; or
>
> (3) a person or organization covered by this chapter from establishing, sponsoring, observing or administering the terms of a bona fide benefit plan that is not subject to State laws that regulate insurance.

42 U.S.C. § 12201(c) (1994).

[207] *Id.* ("Paragraphs (1), (2), and (3) shall not be used as a subterfuge to evade the purposes of subchapter I and III of this chapter."). The health plan provider has the burden of proving that the plan is not being used as a subterfuge. *See* EEOC Interim Guidance on Health Insurance, *supra* note 204, at 5.

[208] Parker v. Metropolitan Life Ins. Co., 99 F.3d 181, 190 (6th Cir. 1997). In *Parker*, Judge Gilbert Merritt expressed considerable frustration over the ambiguities inherent in Section 501(c):

> Unlike the language of Title III, which is quite clear, the meaning of the "safe harbor" provision is not self-evident. In fact, the statute appears to be purposefully vague in order to satisfy contending interest groups. Unable to decide on exactly what it intended to legislate, Congress inserted language which looks in both directions. One provision attempts to appease the insurance industry; the other provisions attempt to help the large group of disabled people. In doing so, Congress has again left this Court in the position to give meaning to conflicting statutory language designed as a political compromise. We find that, in this instance, the statute is totally ambiguous on its face.

Id. at 190.

Supreme Court, speaking in an overruled ADEA case; or the EEOC, speaking through its interim enforcement guidance?

a. *Congressional Intent as to the Meaning of Subterfuge*

The ADA legislative history could hardly be more clear as to Congress's intent regarding subterfuge.[209] According to unequivocal statements from Representatives Waxman,[210] Owens,[211] Edwards,[212] and Senator Kennedy,[213] the term subterfuge in the ADA does *not* mean what *Betts* says it does. The credibility of these statements is almost unshakable because the ADA was a bipartisan bill, the speakers were all supporters of the bill, and three of the statements—those of Mazoli, Kennedy, and Edwards—came from a July 13 conference report, just thirteen days before the bill was passed by an overwhelming vote.[214]

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[209] This Note only examines explicit remarks by legislators regarding the meaning of subterfuge. The broader legislative origins of Section 501(c) are intriguing, but slightly beyond the scope of this Note. For a thorough analysis of those origins, see Farber, *supra* note 205, at 876–80.

[210] "I have been informed by those Members who are closely involved in the legislation to overturn the decision of the Supreme Court in *Public Employees Retirement System of Ohio v. Betts*, 109 S. Ct. 256 (1989), that the term 'subterfuge' in the ADA should not be read as the Supreme Court read that term in *Betts*. Thus, there is no requirement of an intent standard under the ADA . . . ." 136 CONG. REC. H4626 (daily ed. July 12, 1990) (statement of Rep. Waxman).

[211] "Questions have been raised to me recently as to whether the term 'subterfuge' should be interpreted consistent with the Supreme Court's decision in [*Betts*]. The answer is 'No.' We use the term 'subterfuge' as a means of evading the purposes of the ADA. It does not mean that there must be some malicious or purposeful intent to evade the ADA on the part of the insurance company or organization." 136 CONG. REC. H4623 (daily ed. July 12, 1990) (statement of Rep. Owens).

[212] *See* 136 CONG. REC. H4624 (daily ed. July 12, 1980) (statement of Rep. Edwards). Representative Edward's statement was nearly identical to that of Senator Kennedy. *See infra* note 213.

[213] Senator Kennedy stated:

> The provision regarding subterfuge in Section 501(c) [of the ADA] should not be undermined by a restrictive reading of the term "subterfuge," as the Supreme Court did in *Betts*. Indeed, our committee recently reported out a bill to overturn the *Betts* decision. It is not our intent that the restrictive reading of *Betts*, with which we do not agree, should be carried over to the ADA [from the ADEA].

136 CONG. REC. S9697 (daily ed. July 13, 1990) (statement of Sen. Kennedy).

[214] These factors tend to soften some of the criticisms of legislative history, which include concerns about the under-representative nature of legislative history as opposed to the statute

One probing question arises from the above discussion of legislative history. If Congress was so intent on overruling *Betts*, why did it not say so in the ADA? This, along with the timing of the ADA,[215] has fueled the theory that the statute does embody the *Betts* interpretation, regardless of the statements of a group of legislators. This theory is grounded by two factors. First, because Congress was aware of the *Betts* interpretation but did not overturn it in the statute, it is presumed to have acquiesced to that interpretation.[216] Second, the OWBPA bills, which removed the subterfuge language from the ADEA, were introduced in Congress on August 3 and 4, 1989[217]—only two days after the subterfuge language was added to the Senate Labor Committee's ADA draft.[218] The House ultimately accepted the Senate version, and the bill was enacted in July of 1990 with the subterfuge language intact. The OWBPA was passed on October 16, 1990.[219] As one commentator notes, "[t]his timing demonstrates that Congress was aware of the prior judicial construction of 'subterfuge' in an analogous statute, knew how to foreclose that construction, and decided nonetheless to add that language to the ADA."[220]

One response to the "acquiescence" argument is that the notion of legislative acquiescence is only a *canon* of statutory interpretation that has limited persuasive value in the courts.[221] As to the timing argument, the fact that

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itself, and include concerns about legislative sabotage that affect later interpretations of a statute. For a comprehensive discussion of the theoretical, constitutional, and practical arguments for disregarding legislative history, see Brudney, *supra* note 132, at 41–66.

215 The account that follows regarding the timing of the ADA is drawn from Farber, *supra* note 205, at 895–97. For a similar account, see David A. Copus & Glen D. Nager, *Benefit Plan Limitations After the Americans with Disabilities Act*, 19 EMPLOYEE REL. L.J. 77, 81 (1993). *But cf.* Ronald S. Cooper, *EEOC Issues Guidance on Applying the ADA to Health Insurance Plans*, 2 EMPL. TESTING L. & POLY. REP. 125, 128–29 (1993) (taking a more cautious approach toward the timing issue).

216 Professors Eskridge and Frickey describe the "acquiescence rule" as follows: "If Congress is aware of an authoritative agency or judicial interpretation of a statute and doesn't amend the statute, Congress is presumed to 'acquiesce' in the interpretation's correctness." *See* ESKRIDGE & FRICKEY, *supra* note 93, at 814.

217 *See* S. 1511, 101st Cong. (1989); H.R. 3200, 101st Cong. (1989).

218 The Senate Labor Committee added the subterfuge language to the ADA in its markup on August 2, 1989. *See* D.C. BAR, DISTRICT OF COLUMBIA BAR TASK FORCE REPORT ON THE EFFECTS OF THE AMERICANS WITH DISABILITIES ACT ON EMPLOYER-SPONSORED HEALTH PLANS 42, 60 n.192 (1993).

219 *See* Older Workers Benefit Protection Act, Pub. L. No. 101-433, 104 Stat. 978 (1990) (codified in scattered sections of 26 U.S.C.).

220 Farber, *supra* note 205, at 897.

221 Professors Eskridge and Frickey describe canons of statutory construction as "rules of thumb," which "enable interpreters to draw inferences from the language, format, and subject matter of the statute." ESKRIDGE & FRICKEY, *supra* note 93, at 634.

subterfuge was added just before the OWBPA amendments could support an entirely different inference than the above proposed one. Because the OWBPA and legislative history speak so clearly about what subterfuge does *not* mean, Congress may not have felt the need to reiterate those sentiments in the ADA,[222] especially in light of the institutional costs to Congress of amending a statute to override a judicial decision.[223]

b. *The Supreme Court on Subterfuge*

The Supreme Court in *Betts* adopted the *McMann* definition of subterfuge—"a scheme, plan, stratagem, or artifice of evasion"[224]—which carries with it a connotation of specific "intent... to evade a statutory requirement."[225] This approach was explicitly rejected by Congress in the OWBPA[226] and in numerous sources of ADA legislative history.[227] Furthermore, even though *Betts* interpreted the same word— subterfuge—it did so in the context of the ADEA, not the ADA.[228] The Court has not yet addressed

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[222] Representative Owens, after expressing disapproval with the *Betts* interpretation of subterfuge, stated that: "Indeed, our committee recently reported out a bill [i.e., the OWBPA] to overturn the *Betts* decision for which I voted.... It is not our intent that the restrictive reading of *Betts*, with which we do not agree, should be carried over to the ADA." 136 CONG. REC. H4623 (daily ed. July 12, 1990) (statement of Rep. Owens). Sen. Kennedy made a nearly identical statement. *See supra* note 213. These statements suggest that the rejection of *Betts* in the OWBPA and in the legislative history were perceived by Congress as sufficient to rule out such an interpretation in the ADA. Therefore, an ADA amendment was not considered necessary.

[223] Professor Brudney states that: "The initiation, negotiation, and enactment of a statute is a multidimensional process that requires committing considerable institutional resources, navigating politically sensitive internal procedures, and anticipating substantial societal consequences." Brudney, *supra* note 132, at 16–17. He then provides a detailed account of the struggle involved in overturning the *Betts* decision via the OWBPA. *See id.* at 17–20. Professor Brudney goes on to assert that the devotion of time and resources to the OWBPA's judicial override rendered Congress "marginally less capable" of resolving the meaning of other civil rights statutes in the same period. *See id.* at 20.

[224] United Airlines, Inc. v. McMann, 434 U.S. 192, 203 (1977).

[225] *Id.*

[226] *See* Older Workers Benefit Protection Act, Pub. L. No. 101-433, 104 Stat. 978 (1990) (codified in scattered sections of 26 U.S.C.) and *supra* Part IV.B.2. (discussing congressional override of *Betts*).

[227] *See supra* Part IV.C.2.a.

[228] Professor Brudney points out some basic differences between the ADA and ADEA subterfuge provisions. *See* Brudney, *supra* note 132, at 100 n.395. One notable difference is in precise statutory language. The ADA states that safe harbor plans "shall not be used as a subterfuge to evade...," while the ADEA exemption (as it appeared to the *Betts* Court)

the meaning of subterfuge in the ADA.[229]

Therefore, because *Betts* was rejected, and the Court has not since addressed the subterfuge issue under the ADEA or ADA, the lower federal courts should be looking to sources outside the Supreme Court for guidance on the meaning of subterfuge. Nonetheless, *Betts* remains good law in the eyes of many lower courts.[230]

c. *The EEOC Position on Subterfuge*

According to the EEOC, the word subterfuge "refers to disability-based disparate treatment that is not justified by the risks or costs associated with the disability."[231] Whether the challenged insurance distinction is being used as a subterfuge will be determined "on a case by case basis, considering the totality of the circumstances."[232] The EEOC also provides a non exhaustive list of five ways in which a respondent can prove that the distinction is not a subterfuge.[233]

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applies only to a plan "which is not a subterfuge to evade . . . ." *Id.* The former provision, with its mandatory language, is obviously more strict.

[229] Such an opinion is likely forthcoming. As discussed *infra* Part IV.C.2.d, a split is slowly emerging in the appellate courts, and it is only a matter of time before the Supreme Court will be called upon to decide this contentious issue.

[230] *See infra* Part IV.C.2.d (discussing lower court decisions on subterfuge issue).

[231] EEOC Interim Guidance on Health Insurance, *supra* note 204, at 11. The stated subject of the guidance is "the application of the Americans with Disabilities Act of 1990 to disability-based distinctions in employer provided health insurance." *Id.* at 1. This and other enforcement guidance is developed by the ADA Policy Division in the Office of the Legal Counsel for approval by the EEOC Commissioners. For a complete discussion of the development of EEOC enforcement guidance, see CCR REPORT ON ADA TITLE I, *supra* note 1, at 73–76. The Department of Justice has expressed similar views with regard to the meaning of subterfuge. *See* Parker v. Metropolitan Life Ins. Co., 121 F.3d 1006, 1012 n.5 (6th Cir. 1997) (discussing, in dicta, the DOJ view on subterfuge in the context of insurance contracts); Am. With Disabilities Prac. & Compliance Manual (Lawyers Coop) tab 3, at § III-3.11000 (1997).

[232] EEOC Interim Guidance on Health Insurance, *supra* note 204, at 11.

[233] The following justifications are acceptable proof: that the respondent has not engaged in the disability-based disparate treatment alleged; that the distinction is justified by legitimate actuarial data or by actual or reasonably anticipated experience; that the distinction is necessary to satisfy the legally required standards for a fiscally sound insurance plan; that the distinction is necessary to prevent the occurrence of an unacceptable change either in the coverage of the health insurance plan or in the premiums charged to maintain it; or that a disability-specific treatment which was denied by the plan does not provide any benefit (i.e., has no medical value). *See id.* at 11–13.

To further complicate matters, the EEOC issued its subterfuge rule in the form of interim enforcement guidance.[234] In developing such guidance, the EEOC has more latitude in deciding what issues to address and when to publish its guidance, whereas regulations must be issued within a specific time frame prescribed by Congress.[235] The "interim" or temporary nature of the guidance allows the agency to refine the rule before casting it in final form.[236] Therefore, the primary advantages of interim enforcement guidance are flexibility and speed. However, the lack of judicial deference to such guidance seems to offset these advantages.

Interim enforcement guidance is entitled to the least amount of deference because it is published on an "interim," not a permanent basis; and because it is not subject to notice and comment procedure.[237] The interim guidance addressing the subterfuge issue has a more distinct flaw: it has been "interim" guidance for nearly six years—since June of 1993.[238] In fact, in August of 1997, the EEOC actually withdrew proposed plans to issue final guidance on employer-provided health insurance.[239] Even if a good excuse exists for this lapse, the agency nonetheless appears sloppy, and thus deprives itself of the deference that it could secure with final guidance.

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[234] The EEOC issues two other types of guidance which are functionally equivalent to enforcement guidance: (1) Compliance Manuals, *see, e.g.*, *EEOC Compliance Manual Section 902 Definition of the Term "Disability,"* 8 FEP Manual (BNA) 405:7251 (1995) (discussing definition of disability); and (2) Technical Assistance Manuals, *see, e.g.*, *The Americans with Disabilities Act Title I Technical Assistance Manual: Pre-Employment Inquiries About Drug and Alcohol Use*, Jan. 1992, *available in* WL, Database ADA-TAM, File No. I - 8.8.

[235] Congress provided that the EEOC issue regulations within one year after the enactment of the ADA. *See* 42 U.S.C. § 12116 (1994).

[236] The "instructions" in the employer benefits guidance state that "[t]his enforcement guidance is to be used on an interim basis until the Commission issues final guidance after publication for notice and comment." EEOC Interim Guidance on Health Insurance, *supra* note 204, at 1. To date, no such "final guidance" has been issued. The EEOC has used the interim method in only one other context, but in that case, it did issue final enforcement guidance. *See EEOC Enforcement Guidance on Pre-Employment Inquiries Under the Americans with Disabilities Act*, 8 FEP Manual (BNA) No. 783, at 405:7193 (1995) (former interim enforcement guidance issued in June of 1991).

[237] The "interim guidance" is exempt from notice and comment procedure if, for "good cause," the agency finds that such procedure is "impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. § 553(b)(B) (1994). The EEOC has *voluntarily* subjected its "Interpretive Guidance" to APA procedure, even though a specific exemption exists for interpretive rules in § 553(b)(A) (1994). The agency has not adopted that same strategy for its enforcement guidance, although arguably, it should.

[238] *See* CCR REPORT ON ADA TITLE I, *supra* note 1, at 259 (criticizing EEOC for delay of final guidance).

[239] *See id.* at 147, 259.

d. *Judicial Responses to Conflicting Views on Subterfuge*

The lower federal courts are split with regard to the meaning and application of subterfuge.[240] If a court gives significant weight to legislative history, it will likely conclude that Congress overwhelmingly disapproves of *Betts*. However, such a court will remain confused about the precise meaning of subterfuge because Congress offers no specific guidance about what the word *does* mean; even though it speaks quite loudly about what it *does not* mean. Faced with such ambiguities, a court may properly defer to the EEOC interim guidance, which contains the most comprehensive test available to determine the meaning of subterfuge.

If a court does not trust legislative history, or accepts the timing argument discussed above,[241] it may cite *Betts* as the controlling authority, or possibly adopt its own interpretation that conflicts with that of the EEOC. If a court adopts its own interpretation of subterfuge that is inconsistent with both *Betts* and the EEOC, it likely walks a short plank toward reversal. The Supreme Court will probably do one of two things if and when it addresses the subterfuge issue: adopt its pro-employer interpretation from *Betts*, or follow the EEOC position that favors the disability community. No room exists in this scheme for novel interpretations of subterfuge.

If a court adopts the *Betts* interpretation, it must still determine how to apply it, because neither the ADA nor its legislative history provide any technical assistance in this matter. The EEOC's enforcement guidance, however, is replete with such technical assistance. It not only defines the subterfuge rule, but also describes several situations in which the rule should not apply.[242] Despite the fact that the EEOC's subterfuge rule exists in a form that is not entitled to controlling weight, the EEOC is still a reliable source of expertise in the area of employment discrimination.[243] Congress provided no helpful language or context in section 501(c), and the Supreme Court has only defined the word in an overruled ADEA case. Therefore, the EEOC guidance, at the very least, should be persuasive.

It is important to note that, according to the majority of the Supreme Court, EEOC enforcement guidance is not entitled to full *Chevron* deference because it

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[240] *See infra* notes 250–60 and accompanying text (discussing circuit court decisions on the subterfuge issue).

[241] *See supra* Part IV.C.2.a.

[242] *See supra* Part IV.C.2.c (discussing the EEOC position on subterfuge).

[243] Congress has recognized the EEOC's unique expertise in the area of employment discrimination. *See* H.R. REP. NO. 92-238 (1971), *reprinted in* 1972 U.S.C.C.A.N. 2137, 2146 ("Administrative tribunals are better equipped to handle the complicated issues involved in employment discrimination cases.").

does not constitute a "legislative regulation."[244] However, it does qualify for earned deference under *Skidmore*.[245] Therefore, the enforcement guidance, "while not controlling upon the courts by reason of [its] authority, [does] constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance."[246] The extension of *Skidmore* to the EEOC enforcement guidance is a conservative step,[247] as some might argue that this guidance deserves full *Chevron* deference, even though it is not "legislative" in character.[248] Therefore, *Skidmore* is the least deferential standard that could be accorded to the EEOC subterfuge rule. Anything less would be no deference at all.

The Supreme Court has not yet visited the subterfuge issue in the context of the ADA. It has only commented on the meaning of the word for purposes of the ADEA. Despite Congress's explicit rejection of the Court's position on subterfuge, many appellate and district courts still follow *Betts*.[249]

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[244] *See supra* Part II.B.

[245] The Court in *Skidmore* applied its deference standard to the "rulings, interpretations, and opinions of the Administrator." Skidmore v. Swift, 323 U.S. 134, 140 (1994). EEOC enforcement guidance would certainly fall within this broad category of agency guidance to which the *Skidmore* standard applies.

[246] *Id.* The traditional *Skidmore* factors used to determine the persuasiveness of agency guidance, such as "thoroughness" and "validity," require largely normative analysis. One may argue that EEOC enforcement guidance is thorough, by revealing agency fact finding; or valid, by presenting policy arguments in favor of the EEOC position. However, it may be too argumentative, or simply futile, for this Note to speculate about the validity or thoroughness of agency guidance, especially without any judicial authority to support such speculation. These arguments are likely more appropriate for litigants than law students.

[247] As Professor Colin Diver points out, *Skidmore* deference "might mean nothing more than 'respectful or courteous regard'" for the agency rule. *See* Diver, *supra* note 9, at 565.

[248] Justice Antonin Scalia has argued that non legislative EEOC guidance deserves full *Chevron* deference. *See* EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 260 (1991) (Scalia, J., concurring) (arguing that EEOC interpretation "need only be reasonable to be entitled to deference") (quoting EEOC v. Commercial Office Prods. Co., 486 U.S. 107, 115 (1998)). One commentator has suggested that the *Skidmore* factors are applied in the second prong of *Chevron* to determine whether an agency construction is "reasonable." *See* Yavelberg, *supra* note 11, at 183 n.96. Whether or not this is a proper interpretation of *Skidmore* or *Chevron* is beyond the scope of this Note, but well within the scope of another. *See id.* at 183–84. For purposes of this discussion, *Skidmore* is accorded its traditional interpretation, under which a court pays courteous regard to non legislative agency rules, but does not apply *Chevron* deference.

[249] It is not quite clear why lower courts still adhere to *Betts*. It is possible that they have no predisposition toward EEOC guidance and no awareness of the second-class status of the EEOC's guidance. They may simply be more comfortable diving into Supreme Court case law, rather than into the mire of administrative law.

The District of Columbia Circuit adopted the *Betts* definition in *Modderno v. King*.[250] Plaintiff, a beneficiary of a Foreign Service Benefit Plan, brought an action alleging discrimination under section 504 of the Rehabilitation Act[251] based on her mental disability because her plan imposed a $75,000 lifetime maximum for mental health benefits. No such cap existed for physical disability benefits. In determining whether this cap fell within the safe harbor provision, the court followed *Betts*, which imposes a specific intent to evade as a prerequisite to a finding of subterfuge. Because the challenged coverage limitations were adopted in 1990, before ADA standards became applicable to section 504, "the limitations in the Plan cannot constitute a subterfuge to evade congressional purposes."[252]

The court, citing *Betts*, brushed off the EEOC interpretation with apparent ease. "[E]ven assuming deference to the agency under [*Chevron*], the cost-justification requirement was 'at odds with the plain language of the statute itself.'"[253] This is risky reasoning because, first, Congress expressly renounced the *Betts* definition in legislative history, a fact that is not discussed in the opinion. Second, this reasoning is incomplete because the court does not point out how or why the EEOC view conflicts with the ADA. It simply leaps to the conclusion reached in *Betts*.

The same result was reached in *Krauel v. Iowa Methodist Medical Center*.[254] With regard to EEOC guidance, the Eighth Circuit simply agreed with the "conclusions reached in *Modderno* and adopt[ed] them as [their] own."[255] The court also disregarded numerous sources of legislative history,[256] stating that if Congress had intended to reject *Betts*, it should have done so by removing subterfuge from the ADA.[257]

In a more recent case addressing the subterfuge issue, *Ford v. Shering-Plough Corp.*,[258] the Third Circuit adopted the *Betts* interpretation. However, the

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[250] 82 F.3d 1059, 1064 (D.C. Cir. 1996).

[251] *See* 29 U.S.C. § 794 (1994).

[252] *Modderno*, 82 F.3d at 1064. The court brushed off the notion that the OWBPA prevents the application of *Betts* to the ADA. It adopted the popular argument that, because Congress was aware of the *Betts* interpretation when it adopted the subterfuge language, it acquiesced to the Supreme Court interpretation. *See id.* at 1064–65. This argument is discussed further above. *See supra* Part IV.C.2.a.

[253] *Modderno*, 82 F.3d at 1065 (quoting Public Employees Retirement Sys. v. Betts, 492 U.S. 158, 171 (1989)).

[254] 95 F.3d 674 (8th Cir. 1996).

[255] *Id.* at 679.

[256] *See supra* Part IV.C.2.a (citing and discussing legislative history of subterfuge rule).

[257] *See Krauel*, 95 F.3d at 679.

[258] 145 F.3d 601 (3d Cir. 1998).

court conducted its entire subterfuge analysis without any reference to the EEOC guidance. It is possible that the EEOC view was not briefed by the parties in *Ford*, considering the past failures of the rule. It is also possible that, upon examining prior appellate precedent rejecting the rule, the court believed that the EEOC view was not worth mentioning. Either way, it is quite surprising that the agency charged with enforcement of the ADA is completely ignored in a case where it has promulgated a rule directly on point. This may illustrate the EEOC's second-class status even more than cases that explicitly reject its guidance.

Because no other appellate courts have directly addressed the ADA subterfuge issue,[259] the EEOC is "batting zero" in the circuit courts with respect to its definition of subterfuge.[260] The most powerful illustration of this lack of deference is seen in *Ford*, in which the Third Circuit examines *Betts* and the legislative history which denounces it, without even mentioning EEOC guidance. Therefore, the EEOC has not even served the modest role of tiebreaker between competing interpretations of the ADA safe harbor provisions.

Having examined the overall status of the EEOC in the courts, two questions remain. First, why does the EEOC receive less deference than other agencies? Second, how can the EEOC restore its credibility in the courts?

V. REASONS FOR A LACK OF DEFERENCE TO THE EEOC

One reason for the present lack of deference to the EEOC could be the agency's tumultuous history in the courts. The EEOC arose from a highly controversial statute (Title VII), was given weak enforcement power under that statute, and received little deference in its early interpretations. This history may have cast a shadow over EEOC guidance that has drifted into the ADA context, even though the ADA delegates much greater enforcement power to the EEOC. Therefore, because of the failures of the agency in the past, courts may attach a mild presumption of *invalidity* to EEOC guidance, and ultimately strike down that guidance in a reflexive manner.

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[259] The Sixth Circuit in *Parker v. Metropolitan Life Insurance Co.*, did provide a detailed explanation of the subterfuge issue in a footnote. *See* 121 F.3d 1006, 1013 n.7 (6th Cir. 1997). However, the court left the resolution of the issue "for another day" concluding that the challenged disability plan was not covered by ADA Title III (the public accommodations provision), and therefore, "the safe harbor provision [was] not implicated." *Id.*

[260] The district court record was not sufficiently developed to warrant an empirical analysis. I found approximately 34 district court cases that directly addressed the ADA subterfuge issue. However, many of those cases did not articulate their position on deference to the EEOC interim guidance. A handful of district courts applied the *Betts* interpretation, but did not go so far as to reject the EEOC interpretation. In essence, the district court record presents a muddled view of the subterfuge issue. Considering the weak and temporary nature of district court authority, it was simply not worth it to sift through the mud.

A second reason for the lack of deference may be the non technical nature of the subject matter over which the EEOC exerts its regulatory power. In contrast, other agencies promulgate rules and regulations in highly complex or scientific areas of the law. For example, determining the precise amount of benzene allowed in drinking water or the types of economic data required for a valid prospectus requires decisions that ring with agency expertise. The EEOC's domain, employment discrimination, is not an area that requires such technical expertise; rather, logic and basic fairness concerns may dominate decisionmaking in this area. Simply put, judges believe that they do not need an agency telling them who has or has not suffered wrongful discrimination; yet they welcome agency guidance in technical areas where judicial reasoning is not sufficient.[261]

A third reason arises from the actions of Congress itself. Congress often writes ambiguous statutes when dealing with controversial issues. The idea is that agencies will fill any gaps left by Congress, and Congress thereby escapes accountability.[262] The problem is that this allows large amounts of power to shift to agencies which are not directly accountable to the public. When the EEOC is called upon to interpret ambiguous statutory terms such as substantial limitation, or subterfuge, courts are naturally skeptical of its conclusions because, presumably, Congress should be making these sensitive policy decisions. By contrast, an agency interpreting its own regulations, rather than ambiguous statutory terms, is generally given more deference. [263] Therefore, the EEOC takes on a distinct burden when it is called upon to interpret ambiguous statutory terms, especially when such interpretations result in profound policy decisions.

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[261] The D.C. Circuit recognizes this reality. It stated that, when dealing with "a highly technical question... [,] courts necessarily must show considerable deference to an agency's expertise." MCI Cellular Tel. Co. v. FCC, 738 F.2d 1322, 1333 (D.C. Cir. 1984); *see also* Appalachian Power Co. v. EPA, 135 F.3d 791, 797 (D.C. Cir. 1998) (upholding an EPA rule with cognizance of the "deference due to an agency dealing with largely scientific and technical matters").

[262] A cynical description of this drafting phenomenon is "punting." One commentator described the phenomenon as follows: "In the face of uncertainty and factional pressures, Congress can simply punt, by rather vaguely identifying whatever problem is pressed upon it, and then passing it on to an agency." William T. Mayton, *The Illegitimacy of the Public Interest Standard at the FCC*, 38 EMORY L.J. 715, 728 (1989).

[263] This view was expressed by the D.C. Circuit in *Birt v. Surface Transportation Board*, 90 F.3d 580 (D.C. Cir. 1996). Discussing deference to a rule issued by the Interstate Commerce Commission, the court stated that "precedent firmly establishes that courts owe 'even greater deference to agency interpretations of agency rules than ... to agency interpretations of ambiguous statutory terms.'" *Id.* at 589 (quoting Capital Network Sys., Inc. v. FCC, 28 F.3d 201, 206 (D.C. Cir. 1994)).

A fourth reason why the EEOC has received little deference arises from its own carelessness.[264] The interim guidance containing the subterfuge rule is a prime example. This rule has existed in "interim" form for nearly six years, during which a split has arisen in the courts as to the meaning of the rule. The result is a confusing and unpredictable standard for application of the ADA safe harbor provision. The EEOC could eliminate this result quite easily by either repealing the interim guidance or subjecting it to the procedures necessary to establish a final rule. Either way, the agency would be acting responsibly to communicate its final position to the public. In the interim, litigants and courts will continue to struggle with the meaning of subterfuge.

A fifth possible reason exists for the lack of deference to the EEOC. It arises from the internal criticisms levied at the EEOC from bureaucratic entities such as the United States Commission on Civil Rights (CCR). For example, Mary Frances Berry, Chairperson of the CCR, made the following comment with regard to the EEOC: "In general, the Commission found that [the] EEOC is not fully responsive to the needs and views of its stakeholders, including individuals with disabilities, employers, disability professionals, and disability experts."[265] This statement appeared in an elaborate report issued by the CCR in September of 1998, assessing the EEOC's enforcement efforts in the context of Title I of the ADA. The Commission's criticism ranged from shoddy drafting to overuse of non-legislative rules. When an entity such as the CCR devotes a considerable amount of resources to the topic of EEOC effectiveness, and publishes an entire report on that very topic, one can safely assume that the EEOC's effectiveness is questionable. When an agency is the target of such powerful criticism by its political peers, that message could ultimately affect the EEOC's credibility within the courts.

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[264] Criticizing the EEOC as a careless agency may be too harsh, considering the "seemingly insurmountable problems" encountered by the agency. CCR REPORT ON ADA TITLE I, *supra* note 1, at 51. Aside from the weak enforcement powers originally granted to the EEOC, the agency has suffered from numerous management turnovers, insufficient staff, lack of training, and an enormous backlog of cases. *See* UNITED STATES COMM'N ON CIVIL RIGHTS, FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT 86–88 (1971). Furthermore, the enactment of the ADA in 1990 and the Civil Rights Act of 1991 resulted in a 26% increase in the number of adjudicatory charges filed. *See Oversight Hearing on the Equal Employment Opportunity Commission: Hearings Before the Subcomm. on Select Educ. and Civil Rights of the House Comm. on Educ. and Labor*, 103d Cong. 6 (1993) (statement of Linda G. Morra, Director, Education and Employment Issues, Human Resources Division General Accounting Office).

[265] *See* CCR REPORT ON ADA TITLE I, *supra* note 1, at iii.

VI. RECOMMENDATIONS

Having established the EEOC's status as a second-class agency, and some possible reasons for that status, this Note focuses on the means of redeeming the EEOC from its inferior status. The following analysis targets problems associated with particular EEOC rules and guidelines (some of which were not discussed extensively above), and offers recommendations specifically tailored towards those problems. Here, the major concern is not just increased deference or credibility within the courts, but overall improvement of agency functioning.

The first issue is clarity. The EEOC's enforcement guidance on psychiatric disabilities provides one example in which lack of clarity in EEOC guidance can have unfortunate consequences.[266] Among other things, the guidance states that the *DSM-IV*[267] may be "relevant" to identifying mental disorders that qualify for ADA coverage.[268] The guidance states that not all conditions in the *DSM-IV* are disabilities for purposes of the ADA.[269] What is unclear from this guidance is whether the *DSM-IV* is the *only* relevant source. The EEOC does not state its position on conditions set forth in other texts used to classify mental disorders[270] or on conditions that are not documented in any authoritative text. This has lead to concerns in the psychiatric community that the EEOC enforcement guidance may be encouraging a proliferation of frivolous ADA claims based on mental

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[266] *See generally* Enforcement Guidance: The Americans with Disabilities Act and Psychiatric Disabilities, EEOC Compl. Man. (BNA) No. 915.002 (Mar. 25, 1997) [hereinafter EEOC Guidance on Psychiatric Disabilities]. This document was intended to facilitate enforcement of the ADA on charges alleging employment discrimination based on psychiatric disabilities (which fall under the "mental impairment" prong of the ADA definition of disability, 42 U.S.C. § 12102(2) (1994)). For a complete discussion of the EEOC guidance on psychiatric disabilities, see generally Sarah Starnes, *Psychiatric Disabilities and the ADA: An Analysis of Conventional Defenses and EEOC Guidelines*, 18 REV. LITIG. 181 (1999).

[267] AMERICAN PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (4th ed. 1994). "[T]he *DSM-IV* has been recognized as an important reference by the courts and is used widely by American mental health professionals for diagnostic and insurance reimbursement purposes." CCR REPORT ON ADA TITLE I, *supra* note 1, at 119.

[268] *See* EEOC GUIDANCE ON PSYCHIATRIC DISABILITIES, *supra* note 266, at 3.

[269] EEOC regulations state that the following are not mental disabilities: transvestitism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders, compulsive gambling, kleptomania, pyromania, psychoactive substance use disorders resulting from current illegal use of drugs, homosexuality, and bisexuality. *See* 29 C.F.R. § 1630.3(d)–(e) (1997).

[270] Two "other valuable tests used to classify mental disorders [are] the *International Classification of Diseases*, and the *Guides to the Evaluation of Permanent Impairment, Fourth Edition*." CCR REPORT ON ADA TITLE I, *supra* note 1, at 120.

illnesses not covered in the *DSM-IV* or any other text.[271] Thus, one response to the above problem is for the EEOC to clarify whether the *DSM-IV* is the only relevant source for determining mental disabilities, and if not, then the EEOC should identify all of the "relevant" diagnostic texts.[272] As a general recommendation, the EEOC should clarify known ambiguities in its guidance.

Lack of clarity is often an unavoidable result of any drafting effort. However, the EEOC, unlike Congress, can quickly and easily resolve ambiguities arising from its prior pronouncements simply by issuing some form of expedited policy guidance.[273] Therefore, if the EEOC is aware of any serious interpretive problems with its guidance (and entities such as the CCR certainly facilitate that awareness), it is difficult to excuse the agency's inaction.

Another ground for criticism of EEOC guidance is inconsistency.[274] The EEOC guidance on employer-provided health benefits provides helpful illustration. The EEOC states clearly that it does not consider distinctions between mental and physical health benefits to be disability-based distinctions.[275] "However, EEOC does consider this precise distinction to be a disability-based distinction in the context of long term or disability insurance."[276] As one source has noted, the EEOC's distinction between "mental" and "physical" for health insurance but not for disability insurance "abrogates the important purpose of the ADA to prevent any kind of different

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[271] *See id.*; *see also* James J. McDonald, Jr. & Jonathan P. Rosman, *EEOC Guidance on Psychiatric Disabilities: Many Problems, Few Workable Solutions*, *in* NATIONAL SYMPOSIUM ON PSYCHIATRIC DISABILITIES AND THE EEOC'S NEW ENFORCEMENT GUIDANCE UNDER THE AMERICANS WITH DISABILITIES ACT 8 (Jan. 12–13 1998).

[272] *See* CCR REPORT ON ADA TITLE I, *supra* note 1, at 120.

[273] Policy guidance, like interpretive guidance and enforcement guidance, is exempt from the procedural requirements of the APA. *See* 5 U.S.C. § 553(b)(A) (1994).

[274] Recall that consistency of earlier and later pronouncements is one element of the *Skidmore* test. *See supra* Part I.A. Therefore, a lack of consistency could be detrimental to an agency upon judicial review of its guidelines.

[275] *See* EEOC Interim Guidance on Health Insurance, *supra* note 204, at 6. Whenever it is alleged that a health-related term or provision of an employer-provided health insurance plan violates the ADA, the first issue is whether the term or provision is a disability-based distinction. *See id.* at 3. With regard to mental and physical benefits, the EEOC states:

> Typically, a lower level of benefits is provided for the treatment of mental/nervous conditions than is provided for the treatment of physical conditions. . . . [A]lthough such distinctions may have a greater impact on certain individuals with disabilities, they do not intentionally discriminate on the basis of disability and do not violate the ADA.

Id. at 6.

[276] CCR REPORT ON ADA TITLE I, *supra* note 1, at 259.

treatment on the basis of disability."[277] This confusion as to the EEOC's position supports the need for a final version of enforcement guidance, in which the EEOC could simply acknowledge or actively correct its own inconsistent pronouncements.

Probably the most sweeping criticism of current EEOC rulemaking practices is its excessive use of non binding forms of guidance. The EEOC has clear rulemaking authority over the ADA, and can, therefore, issue rules with the force of law upon satisfaction of certain procedures. The agency in recent years has nonetheless favored non binding forms of guidance, such as interpretive guidance, enforcement guidance, and technical assistance manuals. This shift reflects valid concerns on the part of the agency to avoid the heavy burdens of administrative procedure and to effectuate its policies more quickly.[278] However, the EEOC's departure from traditional rulemaking effectively excludes stakeholders from the policy development process.[279]

With regard to public participation in the development of non legislative EEOC rules, the CCR states that the "EEOC 'floats' ideas at meetings and welcomes letters on policy issues from stakeholders, but it does not solicit comments on or circulate drafts of proposed policies outside of the agency before they are approved by the Commissioners."[280] In response to this problem, the CCR recommends the creation of an ADA Policy Advisory Committee, consisting of representatives from interested groups, to ensure interaction with stakeholders.[281] It also recommends a system of notice in the *Federal Register* that apprises stakeholders of EEOC policy developments.[282]

The above recommendations of the CCR are probably valuable mechanisms for ensuring public participation and agency accountability; however, a much simpler solution exists. The EEOC could simply revive the APA notice and comment procedure that has been firmly established in the courts. This may be

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[277] *Id.*

[278] APA notice and comment procedure is not the only hoop through which the EEOC must jump. Like other agencies, the EEOC must also navigate the requirements of the Regulatory Flexibility Act (RFA), 5 U.S.C. §§ 601–612 (1994), the Contract with America Advancement Act, 5 U.S.C. §§ 801–808 (Supp. III 1997), and Exec. Order No. 12,866, 3 C.F.R. 638 (1994), *reprinted in* 5 U.S.C. § 601 at 557–61 (1994), issued by President William J. Clinton. These documents impose numerous procedural requirements above and beyond those of the APA, which affect every stage of the rulemaking process.

[279] It is quite obvious that a primary purpose of the APA notice and comment procedure embodied in 5 U.S.C. § 553 (1994) is to allow for public participation in the rulemaking process.

[280] CCR REPORT ON ADA TITLE I, *supra* note 1, at 248.

[281] *See id.*

[282] *See id.*

even more burdensome to the agency than the combined recommendations of the CCR. However, what the EEOC loses in efficiency, it would almost certainly gain in credibility; that is, courts are much more willing to defer to agency guidance that has satisfied the requirements of the APA.[283] Therefore, the most effective solution is not a radical one. Absent special circumstances,[284] the EEOC should rely primarily upon notice and comment rulemaking when drafting controversial ADA guidance.[285]

VII. CONCLUSION

The EEOC can fairly be characterized as a second-class agency. The grounds for this conclusion lie in an empirical analysis of Supreme Court cases, which yielded a seventy-two percent deference rate for all agencies, compared to a fifty-four percent rate of deference to the EEOC. This conclusion is further reinforced by an individual analysis of the Court's deference cases under each of the statutes that the EEOC administers.

When examining lower court deference cases under the ADA, a statute that contains an impeccable grant of rulemaking authority to the EEOC, the agency's inferior status was further reinforced. Lower courts addressing two EEOC rules—the mitigating measures rule and the subterfuge rule—were reluctant to grant any deference to the EEOC. As the mitigating measures rule has progressed in the judicial system, judges interpreting that rule seem to have taken a more deferential stance to the EEOC. With regard to the subterfuge rule, quite the opposite has occurred. Every appellate court to date has rejected the EEOC's

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[283] The Supreme Court in *General Electric Co. v. Gilbert*, 429 U.S. 125, 141 (1976), *reh'g denied*, 429 U.S. 1079 (1977), acknowledged the cleansing effect of APA notice and comment procedure on EEOC guidance in the Title VII context. *See supra* Part III.A.2.

[284] Numerous instances arise where the EEOC is purely justified in ignoring APA procedures, and few courts would challenge the agency's decision. Examples include situations in which the agency effectuates technical and non controversial changes in its guidance and in which it reacts to an emergency situation affecting public health or safety. *See* LUBBERS, *supra* note 61, at 78–83.

[285] There is a middle ground between notice and comment rulemaking and rulemaking that is purely exempt from APA procedure. This method is "direct-final" rulemaking. *See id.* at 84–87. In direct rulemaking, an agency publishes its proposed rule in the *Federal Register*, with a caption stating that the rule will take effect as written within thirty days unless it receives adverse comment. If such comments appear, then the agency will commence the traditional APA procedures for notice and comment rulemaking. If not, then the rule is published as a final, binding rule. The problem with this method in the EEOC context, especially with ADA guidance, is that the agency will almost certainly receive negative commentary. Considering the strikingly divergent interests between the disability community and employers (especially small businesses), it would be difficult for the EEOC to draft a proposed rule that pleases everyone.

construction of the word subterfuge, and the Third Circuit in *Ford v. Shering-Plough Corp.*[286] simply ignored the EEOC rule in its subterfuge analysis. A case such as *Ford* in which the EEOC view was entirely ignored, even though it had promulgated guidelines directly on point, is probably the most striking illustration of the EEOC's second-class status.

One reason for the EEOC's inferior status could be the non technical nature of its guidelines because courts are much more willing to defer to an agency whose expertise is in complex, scientific, or highly technical areas. Another reason can be traced to Congress's tendency to leave gaps in its statutes by way of ambiguous terms, with the knowledge (or at least hope) that an agency will fill those gaps. Although this phenomenon is common among many statutes, and is dealt with by many agencies, it is possible that the controversial nature of employment discrimination statutes causes Congress to adopt more ambiguous language, and thereby compels more quasi-legislative activity on the part of the EEOC. Finally, the EEOC's status can be attributed to its own carelessness. The agency has engaged in a dangerous pattern of issuing non binding rules, presumably to avoid the practical burdens of APA procedure. Courts offer less deference to agency guidelines that have not been cleansed by APA procedures, even if such guidelines are legitimately exempted from the requirements of the APA. EEOC guidelines have also been criticized for their lack of clarity and for their inconsistencies with other pronouncements.

Despite all the criticism levied against the EEOC, it still has a chance to redeem itself from second-class status. It may do so by closely observing APA procedure or by issuing more authoritative sources of guidance. However, to gain back its respect as an administrative agency, the EEOC may simply have to draft more conservative guidelines. Many courts and citizens feel that the EEOC has gone too far; that it is attempting to legislate rather than regulate. No amount of procedure can remedy this underlying distrust of the EEOC. Unless the EEOC restores that trust, its written guidance may never receive proper deference.

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[286] 145 F.3d 601 (3d Cir. 1998).

APPENDICES

Appendix A. *EEOC View Accepted*

1. Faragher v. City of Boca Raton, 118 S. Ct. 2275, 2292 (1998).
2. Bragdon v. Abbott, 118 S. Ct. 2196, 2209 (1998).
3. International Union v. Johnson Controls, Inc., 499 U.S. 187, 200 (1991).
4. Price Waterhouse v. Hopkins, 490 U.S. 228, 253–54 (1989).
5. EEOC v. Commercial Office Products Co., 486 U.S. 107, 115–16 (1988).
6. Johnson v. Transportation Agency, 480 U.S. 616, 643 n.2 (1987) (Stevens, J., concurring).
7. Western Airlines v. Criswell, 472 U.S. 400, 417 (1985).
8. Washington County v. Gunther, 452 U.S. 161, 190 (1981).
9. EEOC v. Associated Dried Goods Corp., 449 U.S. 590, 600 n.17 (1981).
10. Oscar Mayer & Co. v. Evans, 441 U.S. 750, 761 (1979).
11. Nashville Gas Co. v. Satty, 434 U.S.136, 142 n.4 (1977).
12. Trans World Airlines, Inc., v. Hardison, 432 U.S. 63, 77 (1977).
13. McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273, 279–80 (1976).
14. Albermarle Paper Co. v. Moody, 422 U.S. 405, 431 (1975).
15. Griggs v. Duke Power Co., 401 U.S. 424, 433–34 (1971).

Appendix B. *EEOC View Rejected*

1. Sutton v. United Airlines, Inc., 119 S. Ct. 2139, 2146–47 (1999).
2. Walters v. Metropolitan Education Enterprises, Inc., 519 U.S. 202, 207 (1997).
2. EEOC v. Arabian American Oil Co., 499 U.S. 244, 257–58 (1991).
3. Public Employees Retirement System of Ohio v. Betts, 492 U.S. 158, 171–72 (1989).
4. Ansonia Board of Education v. Philbrook, 479 U.S. 60, 69 n.6 (1986).
5. American Tobacco Co. v. Patterson, 456 U.S. 63, 70 (1982).
6. Mohasco Corp. v. Silver, 447 U.S. 807, 825 (1980).
7. City of Los Angeles, Deptartment of Water & Power v. Manhart, 435 U.S. 702, 719–20 (1978).
8. International Board of Teamsters v. United States, 431 U.S. 324, 378–80 (1977) (Marshall, J., dissenting).
9. General Electric Co. v. Gilbert, 429 U.S. 125, 140–43 (1976).
10. Washington v. Davis, 426 U.S. 229, 263 (1976) (Brennan, J., dissenting).
11. Espinoza v. Farah Manufacturing Co., 414 U.S. 86, 94 (1973).
12. Phillips v. Martin Marietta Corp., 400 U.S. 542, 545–46 (1971) (Marshall, J., concurring).

Appendix C. *Mitigating Measures Rule Accepted*

1. Bartlett v. New York State Board of Law Examiners, 156 F.3d 321, 329 (2d Cir. 1998).
2. Washington v. HCA Health Services of Texas, Inc., 152 F.3d 464, 469–70 (5th Cir. 1998).
3. Baert v. Euclid Beverage, Ltd., 149 F.3d 626, 629 (7th Cir. 1998).
4. Hamilton v. Southwestern Bell Telephone Co., 136 F.3d 1047, 1051 n.13 (5th Cir. 1998).
5. Arnold v. United Parcel Service, Inc., 136 F.3d 854, 863 (1st Cir. 1998).
6. Matzak v. Frankford Candy & Chocolate Co., 136 F.3d 933, 937 (3d Cir. 1997).
7. Burch v. Coca-Cola Co., 119 F.3d 305, 317 (5th Cir. 1997).
8. Foreman v. Babcock & Wilcox Co., 117 F.3d 800, 805 (5th Cir. 1997).
9. Doane v. City of Omaha, 115 F.3d 624, 627 (8th Cir. 1997).
10. Harris v. H & W Contracting Co., 102 F.3d 516, 520 (11th Cir. 1996).
11. Holihan v. Lucky Stores, Inc., 87 F.3d 362, 366 (9th Cir. 1996).
12. Daugherty v. City of El Paso, 56 F.3d 695, 696 n.1 (5th Cir. 1995).
13. Roth v. Lutheran General Hospital, 57 F.3d 1446, 1454 (7th Cir. 1995).

Appendix D. *Mitigating Measures Rule Rejected*

1. Sutton v. United Airlines, Inc., 130 F.3d 893, 902 (10th Cir. 1997).
2. Gilday v. Mecosta County, 124 F.3d 760, 766 (6th Cir. 1997) (Guy, J., concurring).
3. Ellison v. Software Spectrum, Inc., 8-5 F.3d. 187, 191 n.3 (5th Cir. 1996).